VYAVASTHÁ-CHANDRIKÁ,

A DIGEST

OF

HINDU LAW,

AS CURRENT IN ALL THE PROVINCES OF INDIA, EXCEPT BENGAL PROPER,

COMPRISING VYAVASTHÁS OR PRINCIPLES DEDUCED FROM SANSKRIT BOOKS OF PARAMOUNT AUTHORITY, VIZ. :—THE MITÁKSHARÁ, VÍRA-MITRODAYA, VIVÁDA-CHINTÁMANI, VYAVAHÁRA-MAYÚKHA, SMRITI-CHANDRIKÁ, &C., WITH AUTHORITIES AND INTERPRETATIONS, &C. FROM THOSE BOOKS AND OTHER SOURCES, ANNOTATIONS FROM THE PRINCIPLES AND ELEMENTS OF HINDÚ LAW, &C., ALSO PRECEDENTS OF THE PRIVY COUNCIL, THE LATE SUDDER AND SUPREME COURTS, THE PRESENT HIGH COURTS OF CALCUTTA, ALLAHABAD, BOMBAY AND MADRAS, ALSO ADMITTED LEGAL OPINIONS, AND RESPONSA PRUDENTUM.

BY

SHYÁMÁ CHARAN SARKÁR VIDYÁ-BHÚSHAN,

FELLOW OF THE CALCUTTA UNIVERSITY, LATE TAGORE LAW PROFESSOR, AUTHOR OF TWO DIGESTS OF MUHAMMADAN LAW, OF THE VYAVASTHÁ-DARPANA, AND OTHER WORKS.

IN TWO VOLUMES.

VOL. I.

IN TWO PARTS.

BIBLIOTHECA BODLEIANA

"Let him (the King) establish the laws of the Conquered nation, as declared *in their books*."

MANU, Ch. vii, *v*. 203.

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PREFACE.

The Smriti and its Origin.—The Hindú law, according to the Hindú belief, is of divine origin, being derived from the *Vedas* which are revelations from GOD ALMIGHTY, heard by BRAHMÁ and others,—whence they are also called "*Sruti*" (audition or what was heard). BRAHMÁ, the self-existent, having extracted or prepared this law from the revealed ordinances or the *Vedas*, fully taught it to his grandson the first MANU, who again having remembered all that taught the same to his sons MARÍCHI and other sages,* denominated "Lords of created beings (*Prajápatis*). In consequence of being remembered by MANU and the rest, the Hindú law is termed "*Smriti*" (recollection or what was remembered), as well as the "*Dharma-shástra.*" Thus MANU :—

"The roots of the law are the whole *Veda*," &c.—Chapter ii, *vachana* or verse 6.

Whatever law has been ordained for any person by MANU, that law is fully declared in the *Veda* : for he was perfect in divine knowledge."—*Ibid. v.* 7.

"By '*Sruti*,' or what was heard from above, is meant the *Veda*; and by '*Smriti*,' or what was remembered from the beginning, the body of the law : those two must not be oppugned by heterodox arguments; since from those two proceeds the whole system of duties."—*Ibid. v.* 10.

"From that which is, the first cause, not the object of sense, existing *every where in substance*, not existing

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* ATRI, ANGIRÁ, PALUSTA, PULAHA, KRATU, PRACHETÁ, VASHISHTHA, BHRIGU, and NÁRADA.

to our perception, without beginning or end, was produced the divine male, famed in all worlds, under the appellations of BRAHMÁ.—Having divided his own substance, the mighty power became half male, half female, *or nature active and passive*, and from that female he produced VIRÁJ: Know me, O most excellent of *Bráhmanas*, to be that person, whom the male *power* VIRÁJ, having performed austere devotion, produced by himself, me, the secondary framer of all this *visible world*. It was I, who desirous of giving birth to a race of men, performed very difficult religious duties, and first produced ten Lords of created beings, eminent in holiness: MARÍCHI, ATRI, AṄGIRÁ, PULASTYA, PULAHA, KRATU, PRACHETÁ or DAKSHA, VASHISHTHA, BHRIGU and NÁRADA: They, abundant in glory, produced seven other MANUS, together with deities and the mansions of deities, and *Maharshis*, or great Sages, unlimited in power.—He (BRAHMÁ,) having enacted this code of laws, himself taught it fully to me in the beginning: afterwards, I taught it to MARÍCHI and the nine other holy sages. This *my son* BHRIGU will repeat the divine code to you without omission; for that sage learned from me to recite the whole of it."—Chap. I., *vs.* 11, 32—36, 58, 59.

The *Smriti* or *Dharma shástra* comprises three *Kándas* or *Adhyáyas* (Books or parts), the *áchára* (ritual) which comprises rules for the observance of religious rites and ceremonies, social and moral duties of the different castes; the *Vyávahara* (civil acts and rules,) which embraces forensic law and practice as well as rules for private acts and contests; and the *Práyashchitta* (expiation,) the atonement or religious penalty for sin.

The Sages who wrote on the Dharma shástra.—The *Dharma shástra* is to be sought primarily in the institutes called *Sanhitás* of the holy sages, whose number according to the list given by YÁJṆYAVALKYA is twenty:

NASHI, 33 JÁBÁLI, 34 SUMANTU, 35 PÁRASKARA, 36 LOUGÁKSHI, and 37 KUTHUMI.—*Rám-krishna* in his glossary to the *Grijhya* or *Grijhya-sútra* of PÁRASKARA, mentions thirty-nine, of whom nine are not to be found in any of the above lists. These (nine) are 38 AGNI, 39 CHYAVANA, 40 CHHÁGALEYA, 41 JÁTÚKARANYA, 42 PITÁMAHA, 43 PRAJÁPATI, 44 BUDHA, 45 SÁTYÁYNA, and 46 SOMA*.

There appear to have been some more legislators, namely, 47 DHOUMYA, the priest of the *Pándavas* and author of a commentary on the Y*ayurveda*, 48 ÁSHWALÁYANA, who wrote on the details of religious acts and ceremonies, 49 ÁTREYA, 50 OUPAJANDHANI, 51 BHARADWÁJA, 52 CHHIDAMBARA, 53 DATTA, 54 GOBHILA, 55 HIRANYA-KESHÍ, 56 JAMADAGNI, 57 KANWA, 58 KÁNWA, 59 KAPILA, 60 KRISHNÁJINI, 61 KÁRSHNÁJINI, 62 KUTSYA, 63 KOUTSYA, 64 LOHITA, 65 MÁRKANDEYA, 66 MOUDGALYA, 67 NÁCHIKETA, 68 PULAHA, 69 POUSHARA-SÁDI, 70 SÁKALYA, 71 SÁKATÁYANA, 72 SÁNDILYA, 73 SATYA-VRATRA, 74 SOUNAKA, 75 SUMATI, 76 VATSYA, 77 VÁRSHÁYANI, 78 VYÁGRA, 79 VYÁGRA-PÁDA, and 80 YÁSKA.

Besides the above, there were very likely some other sages who wrote on the *Dharma shástra*, and who may be discovered (as said by Messieurs West and Buhler) by a further search for MS. and more accurate investigation of commentaries, compilations and digests.

Several *Sanhitás* are sometimes ascribed to one of the above named sages—his greater or abridged institutes (*Vrihat* or *laghu*), and his work when old (*Vriddha*), as *Vrihat Manu Sanhitá*, *Laghu Manu Sanhitá*, and *Vriddha Manu Sanhitá*.

* Professor Stenzler enumerates forty-six legislators, who are the same as those mentioned in the lists of YÁJNYAVALKYA, PARÁSHARA, *Padma-purána*, and *Rámkrishna*, already given, and he considers their *Sanhitás* all to be extant, having himself met with quotations from all; except from those of *Agni*, *Kuthumi*, *Budha*, *Shátáyana*, and *Soma*.

By PARÁSHARA, author of one of the *Sanhitás*, (referring to the Hindú division of the world into four ages,) are assigned, as appropriate to the *Krita-yuga*, or first age, the institutes of MANU, to the *Tretá* or second, the ordinances of GOUTAMA, to the *Dwápara* or third, those of SHANKHA and LIKHITA, and to the *Kali* or fourth, (the present sinful or iron age as it is deemed,) his (PARÁSHARA'S) own ordinances. That distinction, however, does not seem ever to have been actually observed,* the institutes of all and every one of the sages being respected as of equal authority next to those of MANU.

Manu and his Institutes.—The *Mánava dharma shástra* is above all of them: it is regarded by us Hindús as next in sanctity to our scriptures, the *Vedas*, and is the oldest of the memorial laws. The author of the *Manu-sanhitá* is that MANU, who is *Swáyambhuva* (sprung from the *Self-existent*). He is the grandson of BRAHMÁ and the first of the seven MANUS who governed the world. It was he who produced the holy sages and the rest, and was not only the oldest but also the greatest of the law-givers after BRAHMÁ.†

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* In fact, had PARÁSHARA'S *Smriti* alone been adopted as the *dharma shástra* of the present age, it would not have been sufficient for the purpose ; inasmuch as the *Vyavahára kánda* is entirely wanting in his institutes : so that a professed commentary on this *Smriti* (which will be hereafter noticed) is founded, in this respect, upon nothing belonging exclusively to PARÁSHARA, beyond a verse extracted from the *áchára* or the first *kánda* purporting merely that the princes of the earth are in this age enjoined to conform to the dictates of justice.' *Vide* Str. H. L. Pref. pp. xii, xiii.

† This is manifest from the verses of *Manu-sanhitá* already cited at pp. i & ii. Dr. Max Müller, at the conclusion of his letter to Mr. Morley, says :—"It is evident that the author of the metrical code of law speaks of the old MANU as of a person different from himself, when he says (Ch. x, *v.* 63 :) 'Not to kill, not to lie, not to steal, to keep the body clean and restrain the senses ; this was the short law which MANU proclaimed amongst the four castes.'" And seeing MANU spoken of in the third person he conjectures that the author of the metrical code of *Mánava dharma shástrá* was not the first of all the MANUS. This must have proceeded from his not bearing in mind that the laws of MANU were rehearsed to the *Rishis* by BRIGU who of course mentions MANU in the third person ; consequently it was quite consistent that this sage, after imparting the dictum of MANU as in the verse cited, should say : "this was the law which MANU proclaimed among the four castes." Thus another MANU is not the author of the

Besides the usual matters treated of in a code of laws, the *Laghu sanhitá* of MANU, (which comprises in all 2,685 *shlokas* or couplets, and is divided into twelve chapters,) comprehends a system of cosmogony, the doctrines of metaphysics, precepts regulating the conduct, rules for religious and ceremonial duties, pious observances, and expiation, and abstinence, moral maxims, regulations concerning things political, military, and commercial, the doctrine of rewards and punishments after death, and the transmigration of souls together with the means of attaining eternal beatitude.*

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code speaking of the old MANU as a different person from himself, but it is BHRIGU who does so. Besides, it was an ordinary custom with the ancient sages to refer to themselves in the third person. (*Vide* Preface to MANU by Sir Wiliiam Jones, p. xiii.) And it will appear on reference to MANU Chapter I, verses 38, 57, 58, 59, and 60 (*ante*, pp. 1 & 2,) that the first MANU, who is *Swáyambhuva*, (sprung from the *Self-existent*,) learnt the law from BRAHMÁ and taught it to the ten holy sages including BHRIGU, who, appointed by MANU to promulgate his laws, *repeated* the divine code to the *Rishis*. It is moreover asserted in the Preface to the *Sanhitá* of NÁRADA, a son of the *Swáyambhuva*, that the same MANU having composed his code in a hundred thousand *shlokas* or couplets, arranged under twenty-four heads in a thousand chapters, delivered the work to NÁRADA, the sage among gods. Thus there can be no doubt that the author of the *vrihat Manu-sanhitá* was the first of all the MANUS; and it appears from the above verses that *Laghu Manu-sanhitá* which we see was taught to, and rehearsed by, BHRIGU.

* Various dates have been suggested by the European scholars who have endeavoured to ascertain the period of the composition of the code of MANU's laws. Chezy and Deslongchampes, (the latter of whom professes to have formed his opinion from an examination of the code itself,) conceive that it was composed in the 13th century previous to the Christian era. Schlegel gives it as his decided and well considered opinion, '*quod multorum annorum meditatio me docuit*,' that the laws of MANU were promulgated in India at least as early as the seventh century before Alexander the Great, or about a thousand years before Christ. He places the *Rámáyana* of VÁLMÍKI at about the same date, and doubts which of them was the older. Elphinstone, who is inclined to attribute great antiquity to the institutes of MANU on the ground of difference between the laws and manners therein recorded and those of modern times, and from the proportion of the changes which took place before the invasion of Alexander the Great, infers that a considerable period had elapsed between the promulgation of the code and the latter epoch; and he fixes the probable date of MANU, to use his own words 'very loosely' somewhere about half way between Alexander (in the fourth century before Christ,) and the *Vedas* (in the fourteenth.) Professor Wilson thinks that the work of MANU, as we now possess it, is not of so ancient a date as the *Rámáyana*; and that it was most probably composed about the end of the third or commencement of the second century before Christ. Sir William Jones's inference, founded on a consideration of the style, is, however, opposed to the learned Professor's conclusion. Sir William says, and with reason too: "the Sanskrit of the three *Vedas*, that of the *Mánava dharma*

The other sages wrote *Sanhitás* on the same model, and they all cited MANU as their authority, whose *Sanhitá* must therefore be fairly considered to be the basis of all the text-books on the system of Hindú jurisprudence. The law of MANU was so much revered even by the sages that no part of their codes was respected if it contradicted MANU. The sage VRIHASPATI, now supposed to preside

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shástra, and that of the *Puránas* (of which the *Rámáyana* is one,) differ from each other in pretty exact proportion to the Latin of Numa, from whose laws entire sentences are preserved, that of Appias which we see in the fragments of the twelve tables, and that of Cicero or of Lucretius, where he has not affected an obsolete style : if the several changes, therefore, of the Sanskrit and Latin took place, as we may fairly assume, in times very nearly proportional, the *Vedas* must have been written about three hundred years before these institutes and about six hundred years before the *Puránas*." He then remarks : "the dialect of MANU is even observed in many passages to resemble that of the *Vedas*, particularly in a departure from the more modern grammatical forms, whence it must at first view seem very probable that the laws now brought to light were considerably older than those of Solon or even of Lycurgus, although the promulgation of them before they were reduced to writing might have been coeval with the first monarchies established in Asia." Upon such and other grounds he fixes the date of the actual text at about the year 1280 before Christ. Thus these opinions as to the date of the institutes of MANU, being founded not on any historical or positive proof, but mere conjecture, are, as might have been expected, contradictory and quite inconclusive. Now if the sage NÁRADA be believed, he asserts in the preface to his law tract, that MANU, having composed the laws of BRAHMÁ in a hundred thousand *shlokas* or couplets, arranged under twenty-four heads in a thousand chapters, delivered the work to him (NÁRADA, the sage among gods) who abridged it for the use of mankind in twelve thousand verses, and gave them to the son of BHRIGU named SU-MATI, who, for the greater ease of the human race, reduced them to four thousand. Hence it appears that the *Vrihat* (large) *Manu-sanhitá* was composed by MANU himself. The abridged metrical code of *Manu-sanhitá* in question, appears also from the text of the very work to have been composed during MANU's time, (as will be known from the verses 58, 59, and 60, already cited at p. i.) It remains to determine the epoch of MANU's existence. This, in the absence of other evidence, should be believed to be the same as stated in the *Manu-sanhitá* before us, that is, he flourished in the beginning of the world, being progenitor of the races human and divine.—See *ante* pages i & ii.

Sir William Jones, after saying 'we cannot but admit that Minos, Mneues, or Mneuis have only Greek terminations, but that the crude noun is composed of the same radical letters both in Greek and Sanskrit' ;— and leaving others to determine whether our *Menus* (or *Menu* in the nominative,) the son of BRAHMÁ, was the same personage with *Minos* the son of Jupiter and the legislator of the Cretans (who also is supposed to be the same with *Mneuis* spoken of as the first lawgiver receiving his laws from the chief Egyptian deity Hermes, and *Menes* the first king of the Egyptians) remarks : "*Dára-shekoh* was persuaded, and *not without sound reason*, that the first *(ádima)* MANU of the *Bráhmanas* could be no other person than the progenitor of mankind, to whom Jews, Christians, and Musulmans unite in giving the name of *Adam*."

The learned writer further remarks :—"The name of MANU (like *Menes, mens,* and *mind*,) is clearly derived from the root (*man* or) *men* to understand, and it signifies, as all the *Pundits* agree, 'intelligent,' particularly in the doctrines of

over the planet Jupiter, says in his law tract, that 'MANU held the first rank among legislators, because he had expressed in his code the whole sense of the *Veda;* that no code was approved, which contradicted MANU ; that other *shástras* and treatises on grammar or logic retained splendor so long only as MANU, who taught the way to just wealth, to virtue, and to final happiness, was not seen in competition with them.' VYÁSA too, the son of PARÁSHARA before mentioned, has decided, that the *Veda* with its *Angas* or the six compositions deduced from it, the revealed system of medicine, the *Purânas* or sacred histories, and the code of MANU, were four works of supreme authority, which ought never to be shaken by arguments merely human. Above all MANU is highly honored by name in the *Veda* itself where it is declared that 'what MANU pronounced was a medicine for the soul.'

The Sanhitás of other sages.—The following is a concise description of the *Sanhitás* written by several of the other sages *(rishis).*

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the *Vedas,* which the composer of our *Dharma shástra* must have studied very diligently, since great numbers of its texts changed only in a few syllables for the sake of the measure, are interspersed throughout the work.—A spirit of sublime devotion, of benevolence to mankind, and of amiable tenderness to sentient creatures pervades the whole work ; the style of it has a certain austere majesty that sounds like the language of legislation and extorts respectful awe ; the sentiments of independence on all beings but God, and harsh admonitions even to kings, are truly noble ; and the panegyrics on the *Gáyatrí,* the mother (as it is called) of the *Vedas,* prove the author to have adored (not the visible material sun, but) that divine incomparable greater light, (to use the words of the most venerable text of Indian Scripture,) which illumines all, delights all, from which all proceed, to which all must return, and which alone can eradicate (not our visual organs merely, but) our souls and our intellects."

Mr. Morley, the author of the Analytical Digest, who in his introduction to the Hindú law has cited the observations of the Sanscrit scholars of Europe, makes this concluding remark :—" whatever may be the exact period at which the *Mánava dharma shástra* was composed or collected, it is undoubtedly of very great antiquity, and is eminently worthy of the attention of the scholar, whether on account of its classical beauty ; and proving as it does that, even at the remote epoch of its composition, the Hindús had attained to a high degree of civilization, or whether we regard it as held to be a divine revelation, and consequently the chief guide of moral and religious duties, by nearly of a hundred millions of beings."—Morley's Digest, Vol. I. Introd. p. cxcvii.

The other Sanscrit scholars too of Europe do not, and cannot, deny that the *Sanhitá* of MANU is the most ancient or the first work of law.

ATRI composed a remarkable law treatise in verse, which is still extant.

VISHNU is the author of an excellent law treatise, which is for the most part in verse. HÁRITA wrote a treatise in prose. Metrical abridgments of both these works are also extant.

YÁJNAVALKYA appears, from the introduction to his own institutes, to have delivered his precepts to an audience of ancient philosophers assembled in the province of *Mithila.* The institutes of YÁJNAVALKYA are second in importance to MANU, and have been arranged in three books: viz. *A'chára*, *Vyavahára*, and *Práyaschitta kándas* containing one thousand and twenty-three couplets.*

USANÁ (crude form USANAS) composed his institutes in verse, and there is an abridgment of the same.

ANGIRÁ (crude form ANGIRAS) wrote a short treatise containing seventy-two couplets.

YAMA composed a short treatise containing one hundred couplets.

ÁPASTAMBA was the author of a law treatise in prose, which is extant as well as an abridgment of it in verse.

The metrical abridgment only of the institutes of SAMVARTA is found in this country.

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* The age of this code cannot be fixed with any certainty, but it is of considerable antiquity, as indeed is proved by passages from it being found on inscriptions in every part of India, dated in the tenth and eleventh centuries after Christ. "To have been so widely diffused," says Professor Wilson, "and to have then attained a general character as an authority, a considerable time must have elapsed; and the work must date, therefore, long prior to those inscriptions." In addition to this, passages from YÁJNYAVALKYA are found in the *Pancha-tantra,* which will throw the date of the composition of his work at least as far back as the fifth century, and it is probable even that it may have originated at a much more remote period. It seems, however, that it is not earlier than the second century of the Chritian era, since Professor Wilson supposes the name of a certain *Muni, Nanaka,* which name is found in YÁJNYAVALKYA's institutes, originated about that time.—Morley's Introduction to the Hindú Law, pp. xi, xii.

KÁTYÁYANA is the author of a clear and almost full treatise on law, and also wrote on grammar and other subjects.

An abridgment of the institutes, if not the code at large, of VRIHASPATI, is extant.

The treatise of PARÁSHARA, which consists of the *áchára* and *práyaschitta kándas,* is extant.

VYÁSA is the reputed author of the *Puránas* : he is also the author of some works more immediately connected with the law.

SANKHA and LIKHITA are the joint authors of a work in prose, which has been abridged in verse : their separate treatises respectively in prose and poetry are also extant.

DAKSHA composed a short law treatise in verse which is in existence.

GOUTAMA is the author of an elegant treatise although texts are cited in the name of his father GOTAMA, the son of UTATHYA.

SÁTÁTAPA is the author of a treatise on penance and expiation, of which an abridgment in verse is extant.

VASHISHTHA is the last of twenty legislators named by YÁJNAVALKYA : his elegant work in prose is intermixed with verse.

Of the *Sanhitá* of NÁRADA only one Chapter on Civil and Criminal Law is in existence.

The *Sanhitás* of the sages Nos. 21, 26, 28, 29, 31, 43, 44, 48, 51, 55, 64, 72 and 74, (of which some are in prose, some in verse, and some partly in prose and partly in verse) are in existence. But of the *Sanhitás* of most of the other sages only some *vachanas* or texts are found cited and quoted in the commentaries, compilations and digests.

Collections of *Smritis,* or extracts from them, such as the *Chaturvinsati, Shat-trinsat,* (extracts from 24 and 36

Smritis), *Kokila* and *Saptarshi Smritis*, are said to be extant.

The works of the sages do not treat of every subject as the institutes of MANU do ; and it is the opinion of the *Pandits* that the entire work of none of the sages, with the exception of MANU, has come down to the present times. It, as it now exists, is incomplete.

Commentaries.—There are glosses and commentaries on some of the principal institutes, which last, but for them, would have been very imperfectly understood, nay some parts thereof would have been given up as unmeaning or obsolete. Various glosses on the institutes of MANU are said to have been written by the *munis* or holy sages, whose treatises were esteemed as next to the institutes themselves. These, except that of BHÁGURI, do not appear to be extant. Among the modern commentaries, that by MEDHÁTITHI, son of VÍRA-SWÁMÍ BHATTA, which having been partly lost, has been completed by other hands at the court of MADANA-PÁLA, a prince of *Digh*, that by GOBINDA-RÁJA, and that by DHARANÍ-DHARA were in great repute until the appearance of KULLÚKA BHATTA's commentary, which has preference over the other glosses, being considered by the pandits to be the shortest and yet the clearest and most useful.* The glosses of MANU denominated the *Mádhaví* by SHÁYANÁCHÁRYA and the *Nanda-rája-krit* by NANDA- RÁJA appear to be known among the Mahrattas, and the former to be of general authority especially in the Carnatic. The commentary denominated *Manwartha-chandriká* appears also to be a work of cele-

* "At length appeared," says Sir William Jones, "KULLÚKA BHATTA, a *Bráhmana* of Bengal, who, after a painful course of study and the collation of numerous manuscripts, produced a work, of which it may, perhaps, be said very truly, that it is the shortest yet the most luminous, the least ostentatious yet the most learned, the deepest yet the most agreeable commentary ever composed on any author, ancient or modern, European or Asiatic."

brity.* Another commentary on MANU called the *Káma-dhenu* appears to exist and is cited by *Srí-dharáchárya* in his *Smriti-sára.*

An excellent commentary on the institutes of VISHNU, entitled the *Voijoyantí* was written by NANDA PANDITA, who is also the author of a commentary on the institutes of PARÁSHARA.

The copious gloss of *Aparárka* of the royal house of Silara is supposed to be the most ancient commentary on the institutes of YÁJNAVALKYA, and accordingly earlier than the more celebrated commentary on the institutes of that sage,—the *Mitákshará* of VIJNÁNESHWARA. A commentary on YÁJNAVALKYA was also written by DEVA-BODHA, and the one written by BISHWA-RÚPA is often cited in the Digests.

The *Dipa-kaliká* by SHÚLA PÁNI, which is likewise a commentary on YÁJNAVALKYA, is in deserved repute with the Bengal school.†

The *Mitákshará* of VIJNÁNESHWARA or VIJNÁNA YOGÍ, a celebrated ascetic, although professedly a commentary on the institutes of YÁJNAVALKYA, is in fact a general and excellent digest. By citing the other legislators and writers as authority for his explanation of YÁJNAVALKYA's text which he professes to illustrate, and expounding their texts in the progress of his work, and at the same time reconciling the seeming discrepancies, if any, between them, and the text of his author, and thus establishing his own opinion, VIJNÁNESHWARA has surpassed all those writers of commentaries which partake of the nature and

* This work was used by Monsieur Deslongchamps in the preparation of his edition of the institutes of MANU, and in his opinion it is in many instances more precise and clear than the gloss of KULLÚKA BHATTA.

† SHÚLA-PÁNI was a native of *Mithilá*, he resided at *Sahuria* in Bengal, and wrote also a treatise on penance and expiation, which is in great repute with both schools.—Coleb. Dig. Pref. p. xviii.

combine the utility of regular digests with their original character as commentaries.

KULLÚKA BHATTA, the celebrated author of the commentary on the *Mánava dharma shástra*, wrote also a gloss on the text of YAMA, brother of the 7th MANU.

The text book of GOUTAMA was commented upon by HARA-DATTÁCHÁRYA.*

The VARADÁ-RÁJYA, by VARADÁ-RÁJA, is a general digest, but it may be placed among the commentaries, since it is principally framed on the institutes of NÁRADA. It is a work of authority in the Southern schools and especially in the *Drávida* country.

The *Mádhavíya*, or *Mádhavya*, though a commentary on the *A´chára* and *Práyaschitta kándas* of the institutes of PARÁSHARA, is in fact an excellent digest and is of great authority in the southern part of India.†

Necessity for a Digest.—The doctrines of the holy sages do not, however, agree in all respects; nay, on certain points, they differ even from those of MANU himself; but it is not optional with us to reject any of them, for MANU enjoins: "When there are two sacred texts apparently inconsistent, both are held to be law; for both are pronounced by the wise to be valid and reconcilable;" and

* This commentator was a resident of *Drávida*, and is famous for his other compositions: his work, in which he occasionally quotes other *smritis*, is called *Mitákshará*, and must not be confounded with VIJNÁNESHWARA's treatise of the same name.

† This work was composed by VIDYÁRANYA SWÁMÍ, the eminently learned minister of the founder of *Vidyánagara*, who living in the fourteenth century, may be considered to have been, as it were, the lawgiver of the last Hindu dynasty. Of the first and third *kándas* of this celebrated work, to which the author gave the name of his brother MÁDHAVÁCHÁRYA, the basis is the text of PARÁSHARA; but as has been already explained, having for the second, nothing of that *Smriti* to proceed upon, it became in fact, though not in name, a general digest of all the legal authorities prevalent at the time in the southern part of India. However this may detract in some degree from its value as being founded in truth upon no particular text, the general fame of the author is so great, resting as it does, not upon this work alone, but upon others also, particularly on his commentary upon the *Vedas*; that among his more ardent admirers, he is held to have been an incarnation of *Shiva*.—Str H. L. Pref. pp. xv, xvi.

the same is the case, says the commentator KULLÚKA BHATTA with the texts of the holy sages. Under such circumstances reconciliation of the contradictions and discrepancies was the only remedy left. Hence arose the necessity of a complete digest, which, after harmonising the conflicting authorities, might lay down the rules to be followed in practice.

Digests.—Several digests have for that purpose been composed by lawyers of different parts of India. And since the use of digests, the institutes of the sages are not regarded as themselves of final authority, which is to be sought in the conclusions and decisions of the authors of the several digests and the commentaries partaking of the nature of digests, with reference, however, to the schools to which they respectively belong (and which will be presently noticed).* Even the institutes of MANU, the foundation of the body of Hindú law, are in modern times looked upon as a work to be revered rather than to be implicitly followed.

The digests in general contain texts taken from the *sanhitás*, with occasional comments thereupon and passages reconciling their apparent contradictions in fulfilment of the precept of the great lawgiver, MANU. They, moreover, contain frequent citations from other digests for the purpose of correcting or confuting their decisions or corroborating their own. Occasionally texts of the *Sruti* or *Vedas* and *Puránas* are quoted as authorities. The *Sruti* is respected as the highest authority, and the *Puránas* as next to the *Smriti*, which itself is next to the *Sruti*. In forming their opinions and giving decisions the authors of the digests often have had recourse to the following gene-

* And opinions on points of law as current in a particular school are given by the *pandits* or lawyers either in the language of the author of a local digest (if suited for the purpose,) or in their own, which, however, must harmonise the expositions of one of the local digests implicitly followed as authority, and, in either case, texts of sages, if there be any, corroborative of those opinions and expositions.

ral maxims and texts: "A principle of law establised in one instance should be extended to other cases also, provided there be no impediment." "Between rules general and special, the special is to prevail." "If there be a contradiction between a *Sruti* and a *Smriti*, the former is to be followed in preference to the latter; but if there be no such contradiction, the *Smriti* should be acted upon by the virtuous just as the *Vedas*" (JÁBÁLI). "Should there be a contradiction between a *Sruti*, and a *Smriti*, the former must be followed without consideration of any matter" (*Bhabishya Purána*). "Wherever contradictions exist between *Sruti*, *Smriti* and *Purána*, there the *Sruti* is to be preferred; but where a contradiction exists between a *Smriti* and a *Purána*, there the *Smriti* is to be adopted in preference" (VYÁSA). "If two texts (of *Rishis*) differ, reason (or that which it best supports) must in practice prevail" (YÁJNAVALKYA).

The schools of law.—The various digests have not, however, treated of all parts of the *Dharma shástra*, nor have they arrived at the same conclusion. The variations in the doctrines of the digests have led to the formation of the different schools. The digests, with reference to the discrepancies existing among them, may be said to be of five classes, each of which has been adopted as an authority in some particular part of India, and thus have been formed the five schools or divisions of Hindú law. These schools are—' the *Gouríya* or Bengal, the Benares, the *Mithila*,*

* The *Mithilá* school is that of ancient Tirhoot (*Toirabhukti*). In the *Vrihat Vishnu purána*, the boundaries and area of the *Mithilá* country are specified as follows:—"From the river *Koushiki* to *Gundaki* the length (of the country) is said to be twenty four *Yojanas*, (about 192 miles), and from the streams of the Ganges to the forests of the *Himalayá*, the breadth of the country is said to be sixteen *Yojanas* (about 128 miles.)" Hence *Mithilá* contains part of Purnea, part of Bhagulpore, part of Monghyr, part of Sarun, and the whole of modern *Tirhoot*, lately subdivided into the districts of Tirhoot and Durbhunga. See the map of *Mithilá*, which is attached to the translation of the *Viváda-chintá-mani*, by Baboo Prosunno Coomar Tagore, and which exactly corresponds with the above description; see also this part of the Sanskrit preface.

the *Maháráshtra* (Mahratta), and the *Drávida.** The original *Smritis* are of course common to all the schools, but they have each given the preference to the doctrines inculcated in particular digests; and the texts of the sages must be used in the same sense as expounded in the particular digests adopted in each of the schools. Of these five schools, two may be said to be the principal,—the Benares and Bengal; the other three being in most respects assimilated to the Benares school.

The books preferentially used in each school.—The *Mitákshará* of VIJNÁNESHWARA is *the* chief guide of the Benares school, and one of the chief guides of the *Mithilá, Mahratta* and *Drávida* schools, and is one of the greatest, and, indeed, if we take into consideration the extent of its influence, *the greatest* of all the Hindú law authorities, "for it is received," as Mr. Colebrooke observes, "in all the schools of Hindú law from Benares to the southern extremity of the Peninsula of India, as the chief ground-work of the doctrines which they follow, and as an authority from which they rarely dissent." The law books used in the different provinces, except Bengal, agree in generally referring to the authority of the *Mitákshará*, in frequently appealing to its texts, and in rarely,

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* The ancient *Drávida* comprised five countries, (*viz.*), *Andhra, Karnátaka,* Goozerat, Mahratta, and *Drávida* (proper), which were called "*Pancha Drávida*" or five *Drávidas* as it is manifest from the following texts :—

"अन्ध्राः कर्णाटकाश्चैव, गुर्जरा-द्राविडास्तथा। महाराष्ट्रा इति ख्याताः, पञ्चैते द्राविडा स्मृताः॥ कर्णाटाश्चैव तैलङ्गा, गुर्जरा राष्ट्रवासिनः। अन्ध्राश्च द्राविडा पञ्च विन्ध्य-दक्षिण-वासिनः।"

The modern *Drávida* or the Drávida school is the whole of the Southern portion of the Peninsula of India, and is divided into three districts: *Drávida* (properly so called), *Karnátaka*; and *Andra* (properly Andhra).—*Drávida* proper is the country where the Tamil language is spoken, and which occupies the extreme south of the Peninsula. The *Karnátaka* country is that in which the *Karnátaka* language is now spoken. The third district is the *Andra* where the Tilinga or Teligu is now the spoken language. For the boundaries of each of these districts see Morley's Introduction to Hindú law appended to his Analectic Digest vol. I, page cxci.

and at the same time modestly, dissenting from its doctrines on particular points.* That dissent consists in inculcating certain doctrines not contained in, nor sanctioned by, the *Mitákshará;* and the adoption of some of these doctrines and the use of the books inculcating such doctrines distinguish each of the minor schools from that of Benares. The *Mitákshará* must, therefore, be considered as the main authority for all the schools of law, with the sole exception of that of Bengal. The other works, which concurrently with the *Mitákshará* are preferentially respected in the Benares school, are the *Víra-mitrodaya,*† the *Parasuráma-mádhava,* the *Vyavahára-mádhava,* the commentaries on the *Mitákshará* by VISHWESHWARA BHATTA‡

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* The actual time in which VIJNÁNESHWARA wrote the *Mitákshará* is not precisely ascertained, but, according to Colebrooke its antiquity exceeds five hundred, and falls short of a thousand, years. The Pandits, however, have reasons to say that VIJNÁNESHWARA was the Prime Minister of the mighty Emperor VIKRAMÁDITYA, and that he afterwards became an ascetic, when he composed this great work.

† The *Víra-Mitrodoya* was composed by MITRA MISRA by the direction of Rajah Víra Sinha, whence the book is styled " *Víra-mitrodoya.*" The age of this work appears to be less than four hundred years ; as RAGHU-NANDANA, the author of the *Smriti-tattwa,* who flourished, in Nudea about four hundred years ago, has been cited therein. The object of MITRA MISRA's writing this work appears to have been with a view to re-establish or confirm the doctrines of the *Mitákshará* or of the Benares school, many of which were refuted by *Jímúta-váhana,* who was supported by RAGHU-NANDANA and the other writers of the Bengal school ; but, MITRA MISRA, reasoning on the arguments of JÍMUTA-VÁHANA and the rest with great accuracy, has generally refuted their doctrines and confirmed those of his master, VIJNÁNESHWARA. *Víra-mitrodoya* is the work of a great logician and may be regarded as a complete Digest of the *Dharma shástra* of the Benares school, in which the author has generally expounded the doubtful passages and supplied the deficiencies of the *Mitákshará,* and expressed what was left therein to implication ; so that the subjoined *dicta* of the Privy Council may be said to be justly applicable to this elaborate Digest of the *Dharma shástra* :—" The *Víra-mitrodoya,* which by Mr. Colebrooke and others is stated to be a treatise of high authority at Benares, is properly receivable as an exposition of what may have been left doubtful by the *Mitákshará,* and is declaratory of the law of the Benares School."— *Vide* Precedents, pp, 522 and 526, 527.

‡ VISHWESHWARA BHUTTA's commentary, entitled the *Subodhiní,* explains the select passages only,—passages which could not be well understood without explanation.

and BÁLAM BHATTA,* the *Nirnaya-sindhu*,† and the *Vivâda-tândava*‡ and other works of KAMALÁKARA.

The leading authorities of *Mithilá* are the *Vivâda-ratnâkara*,§ and *Vivâda-chintâmani*.|| The *Vivâda-chandra* by LAKSHMÍ or LAKSMIMÁ DEVÍ is likewise much respected in that school¶ The works, which concurrently with the above are of great weight in *Mithilá*, are the treatise on inheritance by *Srîkarâchârya*, the *Madana-párijâta*,** the *Smriti-sâra* or at full length *Smrityartha-sâra* by *Sridharâchârya*, the *Smriti-sâra* or *Smriti-samuchyaya*, by *Harinâthopâdhyâya*, and the *Dwoita-parishishta* by *Keshava Misra*.

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* This commentary which is commonly called '*Balam-bhatta-tîkâ*' was written by a lady—LAKSHMÍ-DEVÍ, whence it is styled *Lakshmî-vyâkhyâna*. She took the *nom de plume* of *Bâlam-bhatta*; and gave a full interpretation of the *Mitâksharâ* and also the widest interpretation to every term of the text, the original of the *Mitâksharâ*.

† See post, page xix. Note

‡ The *Vivâda-tândava* is a book on civil and criminal laws according to the doctrines of the Mitâksharâ. Its author, KAMALÁKARA, has besides this and the *Nirnoya-sindhu* written several works—the *Shûdra-kamalâkara*, *Shânti-kamalâkara*, *Dâna-kamalâkara*, *Prâyashchitta-kamalâkara*, the *Siddhânta-tattwa-viveka-sindhu*, *etc.* In the closing verse of his *Nirnoya-sindhu*, the author states that, that work was finished in the year 1668 of *Vikramâditya*, or 1612 C. E.

§ *Vivâda-ratnâkara* was compiled unnder the superintendence of CHANDESHWARA, the minister of HARA SINHA DEVA, king of Mithilâ. CHANDESHWARA himself is also the reputed author of some law tracts. The *Vyavahâra-ratnâkara*, compiled under the superintendence of the same minister, is also of great authority in *Mithilâ*.

|| This work was composed by VÁCHASPATI MISRA, who was also the author of several other works, namely, the *Vyavahâra-chintâmani*, &c. commonly cited by the name of *Misara*: these also are of great authority in Mithilâ. Mr. Colebrooke said :—' No more than ten or twelve generations have passed since he flourished at Semoul in Tirhoot.—*Vide* Coleb. Dig. Pref. p. xv.

¶ This learned lady set the name of her nephew *Misaru Misra* to all her compositions on law and philosophy, and took the titles of her works from the then reigning prince CHANDRA SINHA, grandson of HARA SINHA DEVA.—*Ibid.*

** This treatise was composed by VISHWESHWARA BHATTA, the above named commentator of the *Mitâksharâ*, and is named in honor of MADANA-PÁLA, a prince of the Jât race who reigned at *Kâshtha-nagara* or *Digh*, and who is apparently the same who gave the title to the *Madana-vinoda* dated in the 15th century of the Sambat Era (Coleb. Dig. pref. xvii, & *Dâ. bhâ.* pref. xi.) Sir William Macnaghten says the author of this work was '*Madanopâdhyâya*.' This work chiefly treats of *âchâra* and *vyavahâra kânda*, and also prevails in the Mahratta country.

In the Mahratta school (or in the province of Bombay) preference is given to the *Vyavahara-mayúkha** the *Nirnoya-sindhu,*† *the Hemádri,*‡ *the Vyavahára-koustubha, Sanskára-koustubha* and *Dharma-sindhu.*§

The works of paramount authority in the *Drávida* school (that is in the territories of Madras &c.) are the *Mádhavíya,* the *Smriti-chandriká*|| and the *Saraswatí-vilása.*¶

These are the law treatises followed in preference by the last three schools on account of their adopting certain especial doctrines which are inculcated by those books but have no place in the *Mitákshará,* which in all other points is respected as the main authority of all those schools of law. In *Urissa* too, which is now connected

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* This is the sixth of the twelve treatises by NÍL-KANTHA all bearing the same title "*Mayúkha,*" and the whole is designated collectively the '*Bhagavanta-bháskara.*' The other eleven treatises of this author treat of religious duties, rules of conduct, expiation, &c.

† This work was written by *Kamalákara Bhatta Káshí-kara* in the sixteenth century of the Cristian era. It treats principally of *áchára* and *práyaschitta* touching incidentally only on questions of a legal nature. The work in question is of considerable authority at Benares, as well as amongst the Mahrattas.

‡ By *Hemádri Bhatta Káshí-kara.* This is a work of antiquity: it contains twelve divisions and treats of all subjects and is respected in many of the schools. *Vopa-deva,* author of the celebrated Grammar '*Mugdha-vodha,*' is said to be also the author of this great work (*Hemádri.*)

§ The *Sanskára-koustubha* by ANANTA-DEVA, the *Dharma-sindhu* by *Káshí-nátha* which principally treats on *áchára* and *Práyashchitta kándas of* the *Dharma-shástra* occupy an equal position respecting religious ceremonies and penances. They are, more frequently consulted by the Mahratta *Shastrís* than the *Mayúkha* which refer to the same subject. Of the three, the *Nirnoya-sindhu* is held in the greatest esteem.

|| By *Devánanda Bhatta.* "This excellent treatise on judicature is of great and paramount authority in the countries occupied by the Hindú nations of *Drávida Toilanga,* and *Karnáta,* inhabiting the greatest part of the Peninsula or *Dekhin,*" Note by Colebrooke appended to his preface to the *Dáya-bhága,* p. iv.

¶ This is a general digest attributed to *Pratápa-rudra Deva Mahá-rája,* one of the princes of the *Kákatya* family, who established themselves to the north of the *Krishna* where they fixed their seat of government, which after extending itself by conquest became the second empire to the southward. The second comprehends, as it does, the territories now belonging to Hyderabad, the Northern Circar, a considerable portion of the Carnatic, and generally speaking, the whole of the countries of which the *Toilungí* is at present the spoken language. This work probably composed by his direction, became the standard law book of his dominions.—See Stra. H. L. Pref. pp. xvi, xvii.

with the province of Bengal, the *Mitákshará* is of paramount authority, with which the works also of *Sambhu-kara Bájpeí* and *Udaya-kara Bájpeí* are received there. Bengal Proper has alone taken for its chief and supreme guide in matters of inheritance* the *Dáya-bhága* of JÍMÚTA-VÁHANA,† which on almost every disputed point is opposed to the *Mitákshará*. This celebrated treatise forms a part of his digest termed "the *Dharma-ratna.*" The arguments by which he establishes his own opinions are treated with great ability; quotations from his work, or references to it, have been made by all the authors of the law tracts current in Bengal. The other works of great authority in Bengal are the *Dáya-tattwa*, the *Subodhiní*, which is a commentary on the *Dáya-bhága* by *Srí-krishna Tarkálankára*, and the *Dáya-krama-sangraha*, &c.

These are the five classes of law books, which are severally respected by the five schools or divisions.‡ It must not, however, be inferred that each of these classes

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* It is indeed in this branch of the law that one would find a great difference in doctrine.

† JÍMÚTA-VÁHANA is said to have reigned on the throne of SHÁLI-VÁHANA. He is probably the same with JÍMÚTA-KETU, a prince of the race of *Silára* who reigned at *Tagara*; and is mentioned in an ancient and authentic inscription found at Salset. (*Vide* Asiatic Researches, vol. i. pp. 357 & 361.)

‡ Mr. Morley, in his recapitulation gives the subjoined list of the books preferentially used in each of the schools of Hindú law :—

I. Bengal School :—*Dharma-ratna* (i. e.) *Dáya-bhága*-and its commentaries by *Srí-krishna Tarkálankára* and *Srínáth Achárjya Churá-mani*, *Dáya-krama-sangraha*, *Smriti-tattwa*, (its) *Dáya-tattwa*, *Vivádárnava-setu*, *Viváda-sárárnava*, and *Viváda-bhangárnava*.

II. *Mithilá* School:—*Viváda-ratnákara*, *Viváda-chintámani*, *Mitákshará Vyavahára-chintámani*, *Dwoita-parishishta*, *Viváda chandra*, *Smriti-sára* or *Smriti-samuchchaya*, and *Modana-párijáta*.

III. Benares School :—*Mitákshará*, *Vír-mitrodaya*, *Mádhavíya*, *Viváda-tándava* and *Nirnaya-sindhu*.

IV. *Maháráshtra* School :—*Mayúkha*, *Mitákshará*, *Nirnaya-sindhu*, *Hemádri*, *Smriti-koustubha*, and *Mádhavíya*.

V. *Drávida* School :—

Drávida Division :—*Mitákshará*, *Mádhavíya*, *Saraswatí-vilása* and *Varadá-rájya*.

Karnátaka Division :—*Mádhavíya*, *Mitákshará*, *Saraswatí-vilása*.

Andra Division :—*Mitákshará* *Mádhavíya*, *Smriti-chandriká*, and *Saraswatí-vilása*.

of law treatises is respected solely by a particular school, and not at all by the other schools; the fact is, that each is of paramount or leading authority with a particular school, and at the same time is on general and uncontradicted points respected as authority in the other schools, though of course in subordination to that which is preferentially used by them severally. A class of law tracts, which is of paramount authority with one school, may also be regarded as of authority in another school on points regarding which no rules are prescribed in the books preferentially used in that school.*

Of the treatises on adoption, the *Dattaka-mímánsá*† of NANDA PANDITA, author of the *Voijoyanti* and the *Pratitákshará*, and the *Dattaka-chandriká*‡ by DEVÁNANDA

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* Thus in Strange's work on Hindú law, which is principally designed for the Mahratta and *Dravida* schools, works of paramount authority in Bengal have been cited on the general points and also on points not touched upon in the law tracts chiefly used in those schools. In the first of the above two cases the Bengal authorities are regarded as secondary to, or corroborative of, the authorities of those schools, while in the second case the authorities of the Bengal school must be regarded as unquestionable authorities also in the said schools by reason of having supplied the deficiency in the law tracts adopted by them. It will also be found from the second volume of Sir William Macnaghten's work on Hindu law, which is composed of precedents or admitted law opinions, that the *Pandits* have on general or uncontradicted points indiscriminately cited the authorities of any school, though the cases in which they gave their opinions appertained to a particular province; and that in the cases of one country they have cited the authorities of another province or school whenever on points at issue they found no rules, prescriptive or prohibitory, in the law tracts of the former province or school.

See also Precedents page 281.

† Mr. Sutherland concludes his remarks upon the *Dattaka-mímánsá* by saying, that 'it is on the whole compiled with ability and minute attention to the subject, and seems not unworthy of the celebrity it has attained.'

‡ The *Dattaka-chandriká* is a concise treatise on adoption and is supposed to be the basis of NANDA PANDITA's more elaborate work. Many of the *Pandits* of Bengal attribute this work to the late *Raghu-mani Vidyá-bhúshana*, spiritual adviser of the *Rájá* of Nuddea and a distinguished *Pandit* who flourished in the latter part of *Jagan-nátha's* life, and is said to have assisted Mr. Colebrooke in the preparation of his translation of the *Dáya-bhága* and *Mitákshará*. One of the grounds of attributing the work to him is, that by putting together consecutively the first letter of the first and third lines and the last letter of the second and fourth lines of the last verse of the book the name '*Raghu-mani*' is formed. The verse in question runs thus:—

"रचैषा चन्द्रिका दत्त-पद्धतेर्दर्शिका लघु।
मनोरमा सविवेकैः रक्षिता धर्म्मतारणिः॥"

Bhatta, author of the *Smriti-chandriká* (*ante*, p. xix,) are the most esteemed: they are almost equally respected all over India, the law of adoption not exhibiting much conflict of doctrines between the several schools, although some difference of opinion may be observed amongst the individual writers. It must be remarked, however, as an important distinction, that where they differ, the doctrine of the *Dattaka-chandriká* is adhered to in Bengal and by the Southern jurists, while the *Dattaka-mimánsá* is held to be an infallible guide in the provinces of *Mithila* and Benares. In addition to these two treatises, there are the *Datta-mimánsá* by Vidyáranya Swámí, the *Datta-chandriká* by Ganga-deva Bájpeí, the *Datta-dípaka* by Vyás-ácharya, the *Dattaka-koustubha* by Nágají Bhatta, the *Dattaka-bhúshana* by Krishna Misra, the *Dattaka-tilaka* by Bhava-deva Bhatta and the *Dattaka-siddhánta-munjarí* by Ráma krishna, the *Dattaka Didhiti* and the *Dattaka-Koumudi*, which are general digests of the law of adoption, but they do not appear to be frequently used or cited by the lawyers. There is another treatise on adoption called the *Dattaka-nirnaya*, which is a compilation of a celebrated *Pandit* of the name of Srí-nátha Bhatta of Mithilá. This work was translated by Mr. Blacquiere, but the translation has not been published.*

An excellent commentary on the *Dattaka-mímánsá* and *Dattaka-chandriká* has been recently written and published by *Bharat-chandra Shiromani*, a celebrated lawyer, and ex-professor of Hindú law in the Government Sanskrit College.

Besides the above, there exist several other commentaries and digests on various subjects. These are the *A'chárya-chandriká* by Srí-náthácharya, son of Srí-

* See Preface to the Considerations on Hindú Law, p. xiii.

KARÁCHÁRYA, both celebrated lawyers of the *Mithilá* school;—the *Vyavahára-kalá* of BHAVA-DEVA BHATTA, author of the rituals much consulted in Bengal;—the *Bráhmana sarvaswa*, *Nyáya-sarvaswa*, *Pandita-sarvaswa* and the other treatises by HALÁYUDHA,* which are chiefly cited in the Bengal digests;—the *Kalpa-taru* by LAKSHMÍ-DHARA, who also composed a treatise on the administration of justice by command of *Govinda-Chandra*, a king of *Káshí* sprung from the *Vástava* race of *Káyasthas*;—the *Govindárnava*, composed under the superintendence of the same prince by NARA-SINHA, who was the son of RÁM-CHANDRA, the Grammarian and Philosopher;—the *Parasu-ráma-pratápa*, a general digest composed by order of *Sabájí-pratápa*, *Rájá* of the Eastern Telinga country, about five hundred years ago. The *Vyavahára-shwíkára* by NÁGAJÍ BHATTA; the *Madana-ratna* by MADANA SINHA, an ancient work of notoriety treating of the *áchára*, *vyavahára* and *práyash-chitta*;†—the *A'chárárka* a work principally on *áchára* and *vyavahára* by SHANKARA BHATTA KÁSHÍ-KARA;—the *Dyota*, a general digest written more than a century ago by JOGA BHATTA KÁSHÍ-KARA;—the *Dinakara-udyota*, a work on *áchára* and *vyavahára* by VISHWA-RÚPA RÁMAKA JOGA BHATTA KÁSHI-KARA;—and *the Prithibí-chandroda*, which also is a general digest. Most of these works are not now in use, but their texts are cited in many of the current digests and commentaries. The work of JITENDRIYA is cited in the *Mitákshará*, *Dáya-bhága*, and other books.

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* This great *Pandit* was the spiritual guide of *Laksmana Sena*, a renowned monarch, who gave his name to an era of which upwards of seven hundred years have expired. *Haláyudha* was a descendant in the fifteenth degree of *Bhattá Náráyana*, author of the *Vení-sanhára*, (a celebrated drama,) and one of the five Vedantists who were brought from Kunouj by RÁJÁ A'DISURA, and whose descendants are almost all the *Rárhi* and *Bárendrá bráhmanas* of the *Sándilya gotra* in Bengal.

† This work is often cited and its doctrine adopted in the *Vyávahára-mayúkha* the chief guide of the Mahratta school.

And the works of DHÁRESHWARA,* BALA-RÚPA, VISHWA-RÚPA, HARI-HARA, MURÁRI MISRA, and many others are occasionally referred to in the *Vivâda-bhangárnava* and some other digests.

Three digests have been written in Sanskrit since the establishment of the British empire in India. The first of these is the *Vivâdárnava-setu*† compiled at the request of Mr. Warren Hastings. This work was proposed as early as the 18th of March 1773, at the opening of the Court of *Sudder Dewanny Adawlut* in Bengal. In the following year a translation of the work was made by Mr. Halhead and published under the title of "A Code of Gentu Laws." This work, however, was disapproved of, and its translation condemned, by Sir William Jones for reasons‡ set out in his letter to the Chief Government of India, in which he strongly recommended the enforcement of the Hindú law and the compilation of a better

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* DHÁRESHWARA is said to be the same as *Rájá Bhoja*. *Vide* Coleb. Dig. pref. page xi.

† This work was compiled by several *Pandits*, of whom *Jagan-nátha*, author of the Digest translated by Mr. Colebrooke, was one.

‡ "It (says the learned judge alluding to the work in question) by no means obviates the difficulties before stated, nor supersedes the necessity or the expedience at least of a more ample repository of Hindú laws, specially on the twelve different contracts to which *Ulpián* has given specific names, and on all the others, which, though not specifically named, are reducible to four general heads. The last mentioned work is entitled the *Vivádárnava-setu*, and consists, like the Roman digest, of authentic texts with the names of their several authors regularly prefixed to them, and explained where an explanation is requisite, in short notes taken from commentaries of high authority. It is as far as it goes, a very excellent work; but though it appear extremely diffuse on subjects rather curious than useful, and though the chapter on inheritance be copious and exact, yet another important branch of jurisprudence, the law of contracts, is very succinctly and superficially discussed, and bears an inconsiderable proportion to the rest of the work. But whatever be the merit of the original, the translation of it has no authority, and is of no other use than to suggest inquiries on the many dark passages which we find in it: properly speaking, indeed, we cannot call it a translation; for though Mr. Halhead performed his part with fidelity, yet the Persian interpreter had supplied him only with a loose injudicious epitome of the original *Sanskrit*, in which abstract many essential passages are omitted." Mr. Colebrooke, by quoting the above remark in his preface to the Digest, and not making any observation upon it either in that book or in any of his works or opinions, seems to have acquiesced in the judgment pronounced upon it by Sir William Jones.

code. The sentiments expressed in that paper are truly worthy of him. "Nothing (he says) could be more obviously just than to determine private contests according to those laws, which the parties themselves had ever considered as the rules of their conduct and engagements in civil life; nor could any thing be wiser than, by a *legislative act*, to assure the *Hindú* and *Mussulman* subjects of Great Britain, that the private laws, which they severally hold sacred, and a violation of which they would have thought the most grievous oppression, should not be superseded by a new system, of which they could have no knowledge, and which they must have considered as imposed on them by a spirit of rigour and intolerance.* So far the principle of decision between the native parties in a cause appears perfectly clear; but the difficulty lies (as in most other cases) in the application of the principle to practice; for the *Hindú* and *Mussulman* laws are locked up for the most part in two very difficult languages, Sanskrit and Arabic, which few Europeans will ever learn,

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* Again, at the conclusion of his preface to MANU, that eminent judge remarks: "whatever opinion in short may be formed of MANU and his laws, in a country happily enlightened by sound philosophy and the only true revelation, it must be remembered that those laws are actually revered as the words of the most High by nations of great importance to the political and commercial interests of Europe, and particularly by many millions of Hindú subjects, whose well directed industry would add largely to the wealth of Britain, and who ask no more in return than protection for their persons and places of abode, justice in their temporal concerns, indulgence to the prejudices of their old religion, and the benefits of those laws, which they have been taught to believe sacred, and which alone they can possibly comprehend."

Sir Francis Macnaghten too remarks: "The right of Hindús to have their contests decided *by their own laws*, has been established by the legislature of Great Britain; and, I most cordially concur in the sentiments which have been expressed by Sir William Jones upon this subject." "As to the *Hindús*, I have not a predilection for the tenets of any of their schools, or for the doctrines of any of their scholiasts, in particular. Such as their law is, they have a right to an administration of it, among the parties themselves. To deprive them of this right against their will, or without their desire, would be rigorous in a civil, and intolerant in a religious point of view; for their laws and their religion are so blended together that we cannot disturb the one without doing violence to the other. Their own is the only law to be administered to them." "Give them not any laws but their own; yet under a pretext of dealing those out let us not subject the people to wrong."—Cons. H. L., Pref. pp. v, vi.

because neither of them leads to any advantage in worldly pursuits; and if we give judgment only from the opinions of the native lawyers and scholars, we can never be sure that we have not been deceived by them. It would be absurd and unjust to pass an indiscriminate censure on a considerable body of men; but my experience justifies me in declaring, that I could not with an easy conscience concur in a decision merely on a written opinion of native lawyers, in any cause in which they would have the remotest interest in misleading the court: nor, how vigilant soever we might be, would it be very difficult for them to mislead us, for a single obscure text, explained by themselves, might be quoted as express authority, though perhaps in the very book, from which it was selected, it might be differently explained, and introduced only for the purpose of being exploded. The obvious remedy for this evil had occurred to me before I left England, where I had communicated my sentiments to some friends in Parliament, and on the bench in Westminster Hall, of whose discernment I had the highest opinion; and those sentiments I propose to unfold in this letter with as much brevity as the magnitude of the subject will admit. If we had a complete digest of *Hindú* and *Mahomedan* laws, after the model of Justinian's inestimable Pandects, compiled by the most learned of the native lawyers with an accurate verbal translation of it into English; and if copies of the work were reposited in the proper offices of the Sudder Dewanny Adawlut and the Supreme Court, that they might occasionally be consulted as a standard of justice, we should rarely be at a loss for principles at least and rules of law applicable to the cases before us and should never perhaps be led astray by the *Pandits* or *Moulavís*, who would hardly venture to impose on us when their imposition

might be so easily detected. It would not be unworthy of a British Government to give the natives of these Indian provinces a permanent security for the due administration of justice among them, similar to that which Justinian gave to his Greek and Roman subjects; but our compilation would require far less labour and might be completed with far greater exactness in as short a time; since it would be confined to the laws of contracts and inheritances, which are of the most extensive use in private life, and to which the legislature has limited the decisions of the Supreme Court in causes between native parties." The letter from which this extract is taken, is dated the 19th of March, 1788.

On the same date, the then Governor General, Marquis Cornwallis, with the concurrence of the Members of Council, accepted the offer in terms honorable to the proposer and expressive of the most liberal sentiments. "The object of your proposition (they say) being to promote due administration of justice, it becomes interesting to humanity; and it is deserving of our peculiar attention, as being intended to increase and secure the happiness of the numerous subjects of the company's provinces." And the result of this proposition, so gladly accepted by the Governor General in Council, was the composition of the *Viváda-sárárnava*, and the *Viváda-bhangárnava:* the former was written by *Sarvoru Trivedí*, a lawyer of *Mithilá*, and the latter by *Jagan-nátha Tarka-panchánana*, and both by the direction of Sir William Jones, who himself had undertaken a translation of the latter work together with an introductory discourse for which he had prepared ample materials,* when the hand of death arrested his

* See his last anniversary discourse as President of the Asiatic Society, vol, iv. p. 176.

labours. Although it must be a matter of regret that the public lost, by his premature death, a translation from his pen of a digest compiled under his direction, yet it must be acknowledged that the scholar selected by Sir John Shore, the succeeding Governor General, for completing* a translation of this digest was one who seems to have devoted much more time and attention to the study of our literature and law, and than whom no one has as yet been able to make a more faithful and complete translation of a law tract in Sanskrit, or to give a better exposition of our law. The translation of the *Vivâda-bhangârnava* or *Jagan-natha's* Digest is commonly known as 'Colebrooke's Digest.' This digest treats in full of the topics of contracts and inheritance as required by Sir William Jones. The author of the work was one of the greatest *Pandits* and also one of the most ingenious logicians then in Bengal; but instead of reconciling contradictions or making anomalies consistent, he has, in many instances, attempted to display his proficiency in logic and promptitude in subtle ingenuity, and has thus rendered the work an unsafe guide for a reader not already well versed in the law. Such reader will often find in it several discordant doctrines on one and the same point, and will be at a loss to know which to follow; and if he follow whatever doctrine he finds at the first sight, without knowing what doctrine is recorded on the same point at another page, he will perhaps do wrong; for there may be in another place of the same book another doctrine, perhaps the just one, and the former may have been founded only on subtle ingenuity. He will moreover see that in one place doubts are

* Because the version of many texts cited in the work come from the pen of Sir William Jones, most of the laws quoted from Manu being found in his translation of the *Mánava-dharma-shástra*, and other texts having been already translated by him when perusing the preceding digest, the *Vivádárnava-setu*.—*Vide* Coleb, Dig. Pref. p. xviii.

ingeniously thrown upon established doctrines and principles laid down by unquestionable authorities, and in another he will find a corroboration of the same doctrines and principles. He will very often find no decision on a point, but only the discordant opinions of several authors of the Bengal, Mithilá and Benares schools. Under such circumstances *he* alone who knows the established doctrines of the different schools can safely make use of the work. It is for the above and other reasons that unfavourable opinions have been expressed by those European scholars who have written on the Hindú law.*

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* The opinion of Mr. Henry Colebrooke is as follows : "In the preface to the translation of the Digest I hinted an opinion unfavourable to the arrangement of it as it has been executed by the native compiler. I have been confirmed in that opinion of the compilation, since its publication ; and indeed the author's method of discussing together the discordant opinions maintained by the lawyers of the several schools, without distinguishing in an intelligible manner which of them is the received doctrine of each school, but on the contrary leaving it uncertain whether any of the opinions stated by him do actually prevail, or which doctrine must now be considered to be in force and which obsolete, renders his work of little utility to persons conversant with the law, and of still less service to those who are not versed in Indian jurisprudence ; especially to the English reader, for whose use, through the medium of translation, the work was particularly intended."—Preface to the *Dáya-bhága*, pp. ii, iii.

"It consists," says Sir Thomas Strange, "like the Roman Digest, of texts, collected from the works of authority extant in the Sanskrit language only, having the names of their several authors prefixed, together with an ample commentary by the compiler founded for the most part upon the former ones. That its arrangement was not, on its first appearance, satisfactory to the learned, and that the commentary abounds with frivolous disquisitions as well as with the discordant opinions of different schools, not always sufficiently distinguished, rests upon the best authority, that of the learned translator ; by whom its utility, for the purpose for which it was planned, is well nigh disclaimed. It is long, therefore, since it was characterised, not unhappily, as 'the best law book for counsel and the worst for a judge.' But in whatever degree, *Jagan-nátha's* Digest may have fallen in estimation, as a book to be used with advantage in our courts, and especially in those to the southward, it remains a mine of juridical learning, throwing light upon every question on which it treats, whatever attention it may require in extracting it."—Str. H. L. Vol. i. pp. xvii—xix.

The author of the Considerations on the Hindú Law remarks :—"The plan of Sir William Jones may have been excellent, but the execution of it fell to the share of *Jagan-nátha.* He has given us the contents of all books indiscriminately. That he should have reconciled contradictions or made anomalies consistent, was not to be expected ; but we are often the worse for his sophistry, and seldom the better for his reasoning. His incessant attempts to display proficiency in logic and promptitude in subtility, he might have spared without regret to his readers."—Cons. H. L. Pref. p. viii.

The author of the Summary of the Laws and customs of the Hindús remarks :—"The Digest of *Jagan-nátha* translated by Mr. Colebrooke, although other subjects are occasionally adverted to, is nominally confined to the law of

The texts of the works adopted in the several schools, being cited and commented upon in the *Vivâda-bhangâr-nava* this book is occasionally used as an authority by the lawyers of the other schools.*

contracts and successions; and the frequent occurrence of jarring texts and obscure commentaries forms a great objection to it as a work of particular reference."—*Ibid,* Pref. p. v.

I concur, however, with Mr. Morley in the opinion that—"Notwithstanding the unfavourable opinions of the *Vivâda--bhangârnava,* pronounced by its learned translator and others, there is no doubt but that it contains an immense mass of most valuable information, more especially on the law of contracts, and will be found eminently useful by those who will take the trouble of familiarising themselves with the author's style and method of arrangement." Sir Thomas Strange and Sir William Macnaghten, whose works abound with references to quotations from the Digest, and many of whose principles are founded thereupon, are striking proofs of the usefulnes of the work in this respect. The learned Translator too has written several of his remarks and opinions on the authority of that Digest. It is only difficult, as already remarked, for a person not conversant with the law, to derive benefit from it; and in fact to him it would be an unsafe guide.

* Mr. Colebrooke, however, in his letter to Sir Thomas Strange says:—"We have not here the same veneration for him when he speaks in his own name or steps beyond the strict limits of a compiler's duty; as his doctrines, which are commonly taken from the Bengal school, or sometimes originate with himself, differ very frequently from the authorities which heretofore prevailed in the south of India. I am sorry that the Southern *Pandits* should have been thus furnished with means of adopting, in their answers, whatever doctrine may happen to be best accommodated to the bias they may have contracted; and I should regret that *Jagan-nâtha's* authority should supersede that of the much abler authors of the *Mitâkshará, Smriti-chandrikâ* and *Mâdhavíya.*" With due deference to that eminent scholar, it may be remarked that if the Southern *Pandits* used an opinion originating with *Jagan-nâtha* himself and not founded upon, or consistent with, an unquestionable authority, notwithstanding that the *Mitâksharâ* and the other authorities expressed a different doctrine on the same point, then their opinion would indeed be objectionable; but if they cited a passage from *Jagan-nâtha's* Digest because they did not find a law on the same point in the books preferably used in their schools, or because they found in *Jagan-nâtha's* Digest an exposition better worded, and not contradicted by the local authorities, the learned gentleman ought not to have been sorry for it; inasmuch as he himself has done the same in many of his remarks, on the opinions of the Southern *Pandits*, published in the second volume of Strange's work on the *Hindú* law. Sir William Macnaghten too, though he in one place considers the *Vivâda-bhangârnava* as a Bengal authority, has founded many of his general principles upon the texts contained in the said Digest. Let the second volume of his work on Hindú Law also be opened, and it will be found that many *vyâvasthâs* relative to cases of the other provinces have been founded by the *Pandits* on the authority of *Jagan-nâtha's* Digest, and these *vyâvasthâs* of theirs have been approved of and published by the learned gentleman himself as correct and accurate. Besides, where *Jagan-nâtha,* citing the authorities of one school, draws a conclusion not inconsistent with its doctrines, or where he gives an exposition as being the doctrine of a certain school, and that exposition is not contradicted by the authorities thereof, or where his work contains an exposition not to be found in, or not prohibited by, any of the law tracts current in that school, there is no reason why that part of his work should not be used by lawyers as an authority

the *Mitákshará*. Mr. Borradaile, a Judge of the Sudder Dewany Adawlut of Bombay, and the author of valuable Reports, has published a translation of the *Vyavahára-mayúkha,* to which he has affixed some annotations referring to the passages of other works on Hindú law, and rendering his version of peculiar utility to the student of the law of that side of India. A translation of the *Dáya-krama-sangraha* has been published by Mr. Wynch, who has judiciously adopted the version of the texts of the legislators and sages of antiquity cited therein from the works of Sir William Jones and Mr. Henry Colebrooke. The institutes of MANU have been translated by William Jones and Sir Graves Haughton into English, and by Monsieur Loiseleur Deslongchamps into French. The version by Jones is, however, generally consulted in preference to the other translations. There is another translation by Baboos Tara Chand Chukerbutty and Chunder Sekhur Dev of the first three chapters of MANU, published in pamphlets, in which the Sanskrit text is given in the *Deva-nágrí* character, a literal translation in Bengalee, and Sir William Jones' translation, with a revised and correct translation in English. The *Dattaka-mímansá* and *Dattaka-chandriká* have been translated by Mr. Sutherland, with useful notes after the manner of his illustrious uncle, Mr. Colebrooke. His version of the two standard works on adoption and the synopsis thereof, which he has appended to his translation, are eminently useful. A French translation of the *Dattaka-chandriká* by Mr. Orianne, has also been published.

A translation of the *Vyavahára-kánda* of JÁGNAVALKYA's institutes by Dr. Roer and F. Montriou Esq., Barrister, has appeared some years ago. This work is entitled "Hindú Law and Judicature," and contains many explanatory and useful notes.

The whole of the *Viváda-chintámani* has been translated by the Hon'ble Prosunno Coomar Tagore, C. S. I. The translation is not however so elaborate and accurate as was expected from a scholar so well known and deputed.

The *Dáya-tattwa* of RAGHU-NANDANA has, of late, been translated by Baboo Golab Chand Shastri, a pleader of the Calcutta High Court.

The translation of that part of the *Smriti-chandriká* which treats of Inheritance, made by Krishna Swami Iyer, is very elaborate and useful. The learned translator has, in foot-notes, almost at every page, cited texts of MANU and some other sages, as also the doctrines and opinions of several Commentators, Compilers and Digest-writers of high authority, such as JÍMÚTA-VÁHANA, VIJNÁNESHWARA and the like, and has likewise occasionally cited decided cases, with respect to particular points; and has at the end of each Chapter or Section given a Summary thereof. By so doing the learned Translator has rendered his work almost as useful as Mr. Colebrooke has by appending elaborate annotations and notes to his translation of the *Dáya-bhága* and *Mitákshará*.

The *Dáya-vibhága* of the *Mádhavíya* commentary and the Law of partition and succession from *Baradá-rája's Vyavahára-nirnaya* (*ante* p. xiii) have been translated by Mr. A. C. Burnell, C. S.

The Chapters on Inheritance from the *Sanhitás* of Á'PASTAMBA, BOUDHÁYANA, GOUTAMA, VASHISHTHA, VISHNU and NÁRADA have recently been translated by Messieurs West and Bühler, who have very prudently printed the *Sanskrit* texts of each of the sages before their translation. The foot-notes appended by them to their translation of the texts in question are very interesting and afford a satisfactory proof of the great learning and research which they have displayed therein.

Merits and demerits of the existing translations.—So at present we have English translations of a large number of the books on the *Dharma Shástra.* But it is a matter of regret that, many of these translations are not quite faithful as they might have been. Not to speak of the simple inaccuracies, but omissions, gross errors, &c., are to be found in several parts of them. For instance :—

The translation of the subjoined passage of the *Mitákshará*—" एकवचनञ्च जात्यभिप्रायम्, अतश्च बह्व्यश्चेत् सजातीया विजातीयाश्च यथांशं विभज्य धनं गृह्णन्ति "* which ought to come between clauses five and six of Chapter II, has been altogether omitted† by Mr. Colebrooke. Again, the text " मातुःस्वसा मातुलानी, पितृव्य-स्त्री पितृ-स्वसा । श्वश्रूः पूर्व्वज-पत्नी च मातृ-तुल्याः प्रकीर्त्तिताः"। cited in the *Dáya-bhága*‡ should have been rendered by—" The mother's sister, the maternal uncle's *wife*, the paternal uncle's wife, the father's sister, the mother-in-law, and an elder brother's wife are pronounced *equal* to the mother"; but Mr. Colebrooke, rendering, perhaps inadvertently, the word मातुलानी (which means a *maternal uncle's wife*) by " a maternal *uncle,*" and omitting altogether the term पितृव्य-स्त्री (a paternal uncle's wife,) has translated the above text as follows :—" The mother's sister, the maternal *uncle,* the father's sister, the mother-in-law, and the wife of an elder brother are pronounced *similar to mothers.*§" In like manner, gross errors and omissions will be found in Mr. Colebrooke's translation of the fol-

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* *Mitákshará*, Sans. p. 207.

† The translation of the above passage is as follows :—" The singular number is used to denote caste or class, so if there be several wives (or widows) of the same caste, and also of different castes, they divide and take the wealth in due proportions."—*Vide* pp. 119, 120, and Prec. p. 258.

‡ See *Dáya-bhága*, Sans. p. 112.

§ See his translation of the *Dáya-bhága*, Chap. V, Sect iii, § 31.

But what is still strange to observe is, that these gross errors and omissions have been allowed to remain in the subsequent editions of the work and also in the citations and quotations therefrom.

lowing text of KÁTYÁYANA—"सर्व्वस्वं गृहवर्ज्जन्तु कुटुम्ब-भरणा-धिकम्। यद्द्रव्यन्तत् स्वकं देयमदेयं स्यादतोऽन्यथा॥" and of YÁJNAVALKYA—"स्वं कुटुम्बविरोधेन देयं दार-सुतादृते। नान्वये सति सर्व्वस्वं, यच्चान्यस्मै प्रतिश्रुतम्॥" so much so, that the author of these pages had to reject that translation and give his own. This will be found on perusal of pages 62 and 63 together with the foot-notes contained therein.

Sometimes translations of one and the same text of a sage made by different persons differ materially from one another. Thus of the following text of MANU—"दौहित्रो ह्यखिलम् ऋक्थमपुत्रस्य पितुर्हरेत्। स एव दद्याद्द्वौ पिण्डौ, पित्रे मातामहाय च॥"* Sir William Jones' translation (which runs thus: "The son, however, of *such* a daughter, who succeeds to all the wealth of her father dying without a son, must offer two funeral cakes, one to his own father, and the other to the father of his mother;")† is materially different from Mr. Colebrooke's translation, which is as follows:—"Let the daughter's son take the whole estate of his own father who leaves no (other) son; and let him offer two funeral oblations;—one to his own father, and the other to his maternal grandfather.‡ Again of the subjoined text of KÁTYÁYANA—"अपकार-क्रियायुक्ता निर्लज्जा चार्थ-नाशिनी। व्यभिचार-रता या च स्त्री धनं न च सार्हति॥§ The translation contained in Colebrooke's Digest runs thus: "The *wife* who does malicious acts injurious to her husband, who has no sense of shame, who destroys his effects, *or* who takes delight in being faithless to his bed, is held un-

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* MANU, Sans. Chap. IX, *v.* 132.

† MANU, Eng. Chap. IX, *v.* 132.

‡ Coleb. *Dá.-bhá.* Chap. XI, Sect. ii § 19.

Of the above translations the one by Mr. Colebrooke may be taken to be nearly correct; but that by Sir William Jones is as loose as his translation of many other texts and passages: see, for instance, the last note at page 3.

§ *Smriti-chandriká* Sans p. 63. *Vyav-Mayú*. Sans. p. 136.

worthy of the property before described,"* that in the *Smriti-chandriká* is as follows—"A *widow* who does injurious acts, who has no sense of shame, who squanders away the money, *and* who is bent upon committing adultery, is held unworthy of wealth (*dhana*),"† and that in the *Vyavahára-mayúkha* is—"But a *wife* who does malicious acts injurious to her husband, who has no sense of shame, who destroys his effects, *or* who takes delight in being faithless to his bed, is held unworthy of *separate property* (*strí-dhana*.")‡

Sometimes one and the same text has been translated by the same person differently in different books. For instance, Mr. Colebrooke has, in his Digest, rendered the subjoined text of NÁRADA—"स्वभागान् यदि दद्युस्ते विक्रीणीयुरथापि वा। कुर्य्युर्यथेष्टं तत् सर्व्वमीशास्ते स्वधनस्य हि ॥" by "If they severally give or sell their own undivided shares, they may do what they please with their property of all sorts, for they have dominion over their own,"§ and in his *Dáya-bhága* by "Should they give or sell their own shares, they do all that as they please, for they are masters of their own wealth."||

Such being the state of the several parts of the existing translations it is very desirable that the translation of the text books be revised and rectified by proper persons employed or authorized by the Government, and that there be a standard and uniform translation

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* Coleb. Dig. Vol. iii (Lond. Ed.) p. 585.

† *Smri. Chan.* Chap. XI, Sect. i, cl. 47.

‡ *Vyav. Mayú.* Chap. IV, Sec. viii § 8.

§ Coleb. Dig. Vol. II. (Lond. Ed.) p. 101.

|| *Dá. bhá.*, Chap. II § 31.

Mr. Borradale and Krishna Swami Iyer have adopted the latter Version. See *Vyav. Mayú.* Chap. IV, Sect. vii § 36, and Smri. Chan. Chap. XV, cl. 1.

Again the translator of the *Viváda-chintámani* has rendered the said text by "Divided partners are competent to give away, sell, or do what they please with their respective property, for then they have become its lords." *Vi. Chi.* p. 314.

of the texts of the sages cited in the Commentaries, Compilations and Digests.

As, however, the translations above mentioned, are accepted as binding authorities, the author of these pages was compelled to adopt those translations of the texts and passages which he had to cite or quote in the present work. Still, however, he could not help giving a rectified translation or a new translation of his own of such particular texts or passages the existing translation of which appeared to him to be grossly erroneous.*

Digests in English.—Besides the above mentioned translations we have some original works on Hindú law written in English. The chief of these are the "Considerations on Hindú Law," "Elements of Hindú Law," and the Principles and Precedents of Hindú Law."

Sir Francis Macnaghten was the author of the Considerations on Hindú Law, which consist of enunciation of principles, seldom founded upon the authority of the law books, but generally collected from the then decided cases, such as ought, in his judgment, to be adopted, and such as ought, if adopted, to continue immutable. Those cases, however, were decided for the most part according to the opinions of *Pandits,* who are spoken of by him in the most disparaging terms, and to whom he says he was obliged to have recourse on points as they arose. Those principles have been illustrated copiously by arguments; and the decided cases from which they have been derived or deduced are repeated over and over, and given *in extenso.* His chapter on Adoption is the longest of all, occupying 122 pages, 42 of which are devoted to a criticism of, and severe reprehension on, a judgment of Sir

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* See, for instance, pages 38, 62, and 63.

Thomas Strange in a particular case. The seventh chapter of the work in question is on Contracts, and is composed only of such texts as are set forth in Colebrooke's translation of the Digest of *Jagan-nátha* ; and the eighth and ninth chapters are for the most part translations from the *Mitákshará*. The Addendum and Appendix treat only of the law of adoption. It is apparent from his writings that he had not the slightest knowledge of the Sanskrit language, nor of the law books not translated into English. His work, however, is more useful than could be expected from an author who was possessed of such insufficient resources, and who, moreover, commenced and finished it in one year.*

The Elements of Hindú Law was written by Sir Thomas Stange whilst Chief Justice of the Supreme Court of Madras. Although he had no knowledge of the Sanskrit language, yet almost every one of the elements containd in his work is based upon authorities cited below the page. In several instances, however, he has erred in not specifying the peculiar doctrines of the different schools, or in blending the especial doctrine of one school with that of another, or in citing authorities of one school for a doctrine of another. The learned author does not so fully treat of the doctrines of the other schools as he does of the two schools in the South of India where he had to administer justice. His work is therefore of greater utility in the Courts of Madras and Bombay than in those of the other parts of India. The second volume of the work, which contains cases and law opinions under the title of "*Responsa Prudentum*" or opinions of the Learned, is indeed very valuable, almost every one of them being followed by re-

* "It is to be regretted," says Mr. Morley, "that the whole work is pervaded by a spirit of exaggerated self-estimation and unjust depreciation of every thing not consonant with the author's professional prejudices."

The work entitled "Treatise on Inheritance, Gift, Will, Sale, and Mortgage" by Mr. F. E. Elberling, late of the Danish Civil Service, contains some principles of the Hindú law, but on the whole it cannot be viewed as altogether a safe guide. Although the author has acted judiciously in citing authorities and precedents in support of the principles contained in his work, yet his precaution seems to have sometimes failed him. He appears to have been totally ignorant of the Sanscrit language, in which (to use the expression of Sir William Jones) the Hindú law is for the most part locked up; and more could not therefore be expected from one, whose knowledge of the sources of that law was so limited.

greater part such as it is stated to be; but if it comprehends also translations and the remarks and written opinions of Europeans, then whatever has come from the pen of that eminent scholar and lawyer, Mr. Henry Colebrooke, ought to be regarded as of greater weight; especially his translations of the *Dáya-bhága* and *Mitákshará*, the former of which works is the standard law in Bengal and the latter is respected in all the schools from Benares to the southern extremity of the peninsula of India as the chief ground-work of the doctrines which they follow; and the translations themselves are also master-pieces, and accompanied as they are with translations of the most illustrative and appropriate comments, &c. they are perhaps more useful than the originals. The translation of the *Duttaka-mímánsá* and the *Dattaka-chandriká*, the standard law tracts on adoption made after the manner of Mr. Colebrooke by his nephew, Mr. Sutherland, and the translation of the portion of the *Mitákshará* made by Sir William Macnaghten, and those of the *Dáya-krama-sangraha* and *Vyavahára-mayúkhá* &c. are of equal authority with the above. Next in importance are the remarks and opinions of Mr. Colebrooke, "whose learning," says Sir Thomas Strange, "in that abstruse science, drawn directly from the original and the most authentic sources, stands acknowledged in Europe as well as in India." The remarks and opinions above alluded to convey, in most instances, not only his strictures on the points referred and opinions reported, but references also to printed authorities in support of his observations, or of the answers of the *Pandits*. It is with reference to one of those opinions that, Mr. Shakespeare, an able Judge of the late Sudder Dewanny Adawlut at Calcutta, said, alluding to Sir William Macnaghten: "Now I imagine Mr. Henry Colebrooke to be the highest European authority on matters of Hindú law; but supposing others to be equally well read, no one can be placed in competition with him as to the two qualifications, a knowledge of the law and of the practice and observances of this Court, in which he was so many years the Chief Judge." And Sir Francis Macnaghten too remarks:—"Upon the right of a *Hindú* to dispose of his property by will, I have seen the opinion of Mr. Colebrooke, and I need not add that there is *not any man* whose opinions may justly command a greater degree of deference." The author of these pages has persued whatever has fallen from Mr. Colebrooke with great attention, and found him generally most accurate and deep, resulting from a thorough study of the Sanskrit books of law mentioned by him, books the whole of which are rarely read by the majority of the lawyers of any school.

Messieurs West and Bühler. In this, the authorities cited by *Shástrís* for the corroboration of their opinions have not generally been given *in extenso* but only the names and the pages &c. of the books containing those authorities are mentioned in abbreviated form leaving the reader to peruse them in those books, and occasionally fresh and more applicable passages have been selected by the authors from the recognized books and added as further authorities for the replies. The notes and remarks by the learned authors are very interesting, and the Appendix is more so as it contains Chapters on Inheritance from the *Smritis* of ÁPASTAMBA, BOUDHÁYANA, GOUTAMA, VASHISHTHA, VISHNU and NÁRADA, with translations appended thereto. But above all, the Introduction is very elaborate, learned and useful. The only thing to be regretted is that the replies of the *Shástrís* contained in the book are not all correct.

Mr. Strange's Manual of Hindú law, though short, is generally correct and clear.

A Digest of Hindú law as administered in the courts of the Madras Presidency has only last year been written and published by the Hon'ble H. S. Cunningham whilst Advocate General of that place but since appointed a Judge of the Calcutta High Court. This book, at which I have only had a glance at present, will be reviewed by me *in extenso* in the 2nd volume of my present work, when I shall be able to procure a book for myself, which is at present not to be had at any of the Calcutta Book-sellers'.

I have, I think, given an all but complete list of the works which treat of the *vyavahára* branch of our law. It remains to notice how justice is administered in accordance with *that* law on which so many works are extant. The judges, barristers, pleaders, and others who know

insignificant in number; consequently, without a complete digest in the English language, combined with a corresponding one in the vernacular of the country, the evil could not be removed, nor the desideratum felt by Sir William Jones and others supplied. The Government enacted that the cases of the Hindús, regarding inheritance &c., shall be decided according to their law, but no means were afforded to the generality of the people of making a proper use or checking the abuse of that law. This was remarked to the author by one of the most intelligent judges of the late Sudder Adawlut, now no more, who at the same time requested him to translate into Bengalee and Urdoo the Principles of Hindú Law by Sir William Macnaghten. That work was thereupon minutely gone through, with a view to determine if a translation of it would be sufficient for the purpose, when it was judged that the work itself required many additions to be made to it and several portions to be rectified to render it correct and complete. The translation and publication of the *Dáya-bhága* and *Mitákshará* on inheritance, the *Dattaka-mímánsá* and the *Dattaka-chandriká* were considered likely to be more expensive and tedious than useful, inasmuch as considerable parts thereof are composed of arguments tending to establish the authors' own opinions and to refute those of others. It would moreover be very difficult for such as would not thoroughly study and digest them readily to discover the principle or decision regarding any point; for it is not rarely the case with those works that in one place a principle appears to be laid down as decisive, but in another (perhaps at the distance of many pages) will be seen a passage which refutes and explodes the former and establishes another. Translations of those works could not therefore be of great use to those who cannot devote much

time to a diligent study of their contents. Besides, now-a-days the judges for the most part consider it safe and convenient to follow the decisions of their learned predecessors, instead of taking the trouble of ascertaining for themselves the law on the point or points at issue.* Hence, the principles laid down in the previous decisions and the opinions of the law officers followed in those decisions or admitted by the courts of justice, form in a great degree the practical part of the law. Consequently in the present state of legal practice it will not be enough if a digest included only the principles contained in the law treatises and the authorities on which they rest; but to be practically useful, such a work was needed as will comprise all the principles laid down in the current law treatises, the unreversed or final decisions, and the admitted law opinions, illustrated by precedents. Moreover it is required to be not only in the vernacular but also in English, inasmuch as all the desiderata are not to be found in any single English book, and perhaps not in all of those hitherto written. It is moreover very dfficult for a person to procure a large number of the English books on the subjects in question, and still more so, if he be in possession of them, to find out what he requires without losing much time in the attempt. To compile a work of the above description required, I confess, more learning and talent than I possess. But as no one more experienced comé forward to undertake this arduous task, and the want of such a work continued to be felt by both *Mofussil* and

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* They ought, however, to be warned that, amongst the decisions said to be passed in accordance with the Hindú law, there are some which are not correct and accurate with reference to *that* law; and as decrees are in themselves not law but merely the application of the law to particular cases, and as the dispensers of justice are by their oaths bound to decide each case upon its own merits in conformity with law, usage, and principles of justice, they should not (and cannot conscientiously) follow a precedent without being satisfied that *that* precedent is in conformity with the law they are to administer. Precedents, therefore, ought to be applied after great consideration and with due circumspection.

metropolitan practitioners, and others, I engaged myself to write a work of the above description.

It at first seemed to me that it would be sufficient to supply the *vyavasthás* or principles in Bengalee and English, with authorities and precedents bearing thereupon. But it occurred to me that if I did not give the Sanskrit passages expressive of those principles and the texts of the holy sages and other great authors on the authority whereof those principles were laid down, there would still be left for the ingenious portion of the *Pandits* a field to work upon. And the little experience that I have had in this department of jurisprudence suggested to me that it was necessary to publish at least two separate books one for the Bengal school and the other for the remaining schools, as it is very difficult to preserve all along the distinction between the laws as current in Bengal and those in the other schools, so much so that even Sir William Macnaghten, who seems to have taken much care about it, has sometimes forgotten it, and blended the special doctrines of one school with those of another. But even were I careful in making the distinctions throughout, still the reader who would not make himself master of them, would very probably overlook them and fall into error.* Add to this the vernacular language of the different schools not being one and the same, the principles, precedents, &c. having reference to Bengal required to be translated into Bengalee, and those peculiar to the other schools into the vernaculars of those provinces, at least into *Urdú*, which in a manner is under-

* "In a general compilation," says Mr. Colebrooke, "where the authorities are greatly multiplied, and the doctrines of many different schools and of numerous authors are contrasted and compared, the reader is at a loss to collect the doctrines of a particular school and follow the train of reasoning by which they are maintained. He is confounded by the perpetual conflict of discordant opinions and jarring deductions, and by the frequent transition from the positions of one sect to the principles of another."—*Dá. bhá.* Pref. p. iii.

high authority, such as the *Vira-mitrodoya*, *Vivâda-ratnâkara*, &c., have been arranged in each section and chapter, then under each *Vyavasthâ* is inserted the reason* for it, (if any,) and after that, is cited the authority or authorities relative to that *Vyavasthâ*.† If any term, phrase or passage required explanation, a letter within parenthesis is placed after that, and an explanation thereof is given in the words of some Commentator or Digest-writer in a following paragraph beginning with the same letter within parenthesis.‡ If a principle was deducible or derivable from an authority or the explanation thereof, that also has been put down with reason and further authority or authorities, if any.§ The annotations consist of passages taken principally from the works of European writers on Hindú law with the numbers of the *Vyavasthâs* to which they relate.|| These are generally for the corroboration or further elucidation of the *Vyavasthâs* to which they refer, and sometimes for the purpose of showing the erroneous views which have been taken by those writers. Then in foot-notes are given the pages of the precedents bearing on, or relative to, each of the *Vyavasthâs*, and also such matters as are more minute and cannot fail to be interesting.¶ Again to save the reader time and trouble the

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* Reason is given, because—"The reason of the law is the life of the law: for though a man can tell the law, if he knows not the reason thereof, he shall soon forget his superficial knowledge. But if he findeth the right reason of the law, and so bringeth it to his natural reason, that he comprehendeth it as his own, this will not only serve him for the undertaking of that particular case, but of many others for '*cognitio legis est copulata et complicata*:' and this knowledge will long remain with him." (LD. Coke upon Litt. Sec. 283.)

The Sage VRIHASPATI ordains:—"Decision must not be given solely by having recourse to the letter of the written codes; since, if no decision is made according to the reason of the law, there might be a failure of justice." YÁJNAVALKYA too says:—If two texts differ, reason (or that which it best supports) must in practice prevail."

For instance,—

† See pages 100—116. ‡ See pages 102—108.

§ See pages 116 and 150. || See pages 101 and 113.

¶ See pages 100—106.

names of the parties and courts, and the dates of the decisions, leaving the reader to procure, and refer to, the original books, a complete set of which (at least those of the Privy Council, and the late Sudder and Supreme Courts of Madras and Bombay) is not to be easily procured in this country, and if at all procurable the above books would very likely cost the purchaser more than twenty times the price of the present work (the *Vyavasthá-chandriká*), and even then without a translation in the Vernacular these would be of little or no use to the Practitioners ignorant of English. I have therefore considered it proper to give in *Urdú* as well as in English the important portions of well-nigh the whole of the important cases including the Sudder Decisions for the years 1851 to 1862, which are not noticed even in any of the abstract Digests of cases.

In the late Supreme Courts and in the Original Side of the present High Courts the Hindú law did and does, govern suits between Hindús with respect to contracts, succession and inheritance in general,* and in the other Courts of British India—with respect to succession, inheritance, marriage, castes, and religious usages, institutions, &c.† All these, therefore, have been made the subjects

* The statute 21st Geo. III, Chapter 70, provides "that their inheritance and succession to lands, rents, and goods and all matters of contract and dealing between party and party shall be determined, in the case of the Mahomedans by the laws and usages of Mahomedans, and in the case of Gentoos by the laws and usages of Gentoos,"

† By Section 15, Regulation IV, 1793, re-enacted for Benares and the Upper Provinces by Regulation V of 1795, Section 3, and Regulation III of 1803, Section 16, it is provided that "in suits regarding succession, inheritance, marriage, and caste, and all religious usages and institutions, the *Hindú* laws with regard to Hindús are to be considered as the general rules by which the Judges are to form their decisions." Although the provisions in the enactments cited would appear to exclude cases of contract, yet there are questions incidentally involved in this subject, and it is so inter-woven with cases which it is the duty of the Courts to decide agreeably to the Hindú law, that attention to the principles of the one may be essential to the due adjudication of the other. For instance, in a claim of inheritance the defendant may plead a title by purchase, and the question will arise as to how far the ancestor was at liberty to contract.—See Macnaghten's Hindú Law, Preliminary remarks, pp. vii, viii.

of the entire *Vyavasthá-chandriká,* and not the whole of the eighteen titles* of the *Vyavahára kánda* of the *Dharma-shástra.* Of these again as questions connected with succession, inheritance, usage, maintenance, partition, and exclusion from inheritance, marriage, *Strí-dhana,* adoption, gift and sale are frequently brought before the British Courts of Justice, they have been copiously treated of, while the other subjects have been briefly adverted to, they being generally adjusted by reference to private arbitration. And, designed as this work is for practical utility, I have omitted those questions regarding inheritance &c., which are obsolete in the present (*kali*) age, such as the succession of the various descriptions of sons other than the *ourasa, dattaka,* and *krittrima,* and of those born of mothers of tribes different from their husband, and also questions regarding slavery which latter are not tried in the Courts of British India.

The first volume of the *Vyavasthá-chandriká* in *Sanskrit* and *Urdú* is also out. This volume contains the Sanskrit texts and passages with the names of the books from which they are taken. This and Volume I in English exactly correspond with each other, in *Vyavasthás,* reasons, authorities, precedents and all other matters.

The second volume, which will contain chapters on partition, marriage, *Strí-dhana,* exclusion from inheritance, adoption &c., will, it is hoped, be soon ready for publication with a corresponding volume in *Sanskrit* and *Urdú.*

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* Of those titles *the first* is debt, or loans for consumption; *the second,* deposits and loans for use; *the third,* sale without ownership; *the fourth,* concerns among partners; *the fifth,* subtraction of what has been given; *the sixth,* non-payment of wages or hire; *the seventh,* non-performance of agreements; *the eighth,* rescission of sales and purchases; *the ninth,* disputes between master and servant; *the tenth,* contests on boundaries; *the eleventh and twelfth* assault and slander; *the thirteenth,* larceny; *the fourteenth,* robbery and other violence; *the fifteenth,* adultery; *the sixteenth,* altercation between man and wife, and their respective duties; the *seventeenth,* the law of inheritance; *the eighteenth,* gaming with dice and with living creatures. These eighteen titles of law are settled as the groundwork of all judicial procedure in this world.—Manu, Ch. viii, *vs.* 4—7.

I cannot close these remarks without expressing my deep indebtedness to Rájá Kamala Krishna Deva Bahádur, the head of the Hindú Community of Calcutta, who following the noble example of the illustrious Rájás of olden times, more especially of his own high-minded grandfather the late Rájá Nava-krishna Deva Bahádur, and father the late Rájá Ráj-krishna Deva Bahádur, has generously patronized the present work by materially aiding me in carrying it through the press, for which act of high-mindedness and favor to one in my position, I would beg here to record my most grateful thanks to the noble Rájá. I cannot likewise omit to tender my best thanks to *Pandit* Hurish-chunder *Kavi-ratna*, Additional Professor of Sanskrit in the Presidency College, who has rendered me great and valuable assistance in the preparation of this work, as well as in carrying it through the press.

I now conclude by observing that, keeping strictly in view a compiler's duty, as I have inserted herein nothing without authority, and as neither time nor labor has been spared in making the present work replete with useful matters, and complete in its kind, and at the same time in adapting it for the study of students as well as for reference in the conduct of cases and administration of justice, I may venture to hope that the present work will meet the same approbation and receive the same patronage of the public, especially of our generous Government, as the *Vyavasthá-darpana* has already done. With these prefatory remarks I now present this volume to a liberal and discerning public to judge of its merits whilst its approbation will, to me, be my best reward after such arduous and unremitting labors, and at the same time this appreciation of my toils will encourage me, no doubt, to still farther and greater exertions towards the speedy compilation of the 2nd volume.

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To ensure the proper pronunciation principally of the Sanskrit words in Part I of this work, I have written them according to the following Romanized system, partially modified from *that* which was originally proposed in the first volume of the Asiatic Researches, and followed by Sir William Jones, Mr. H. Colebrooke, and others.

A: as *a* in c*a*ll or s*a*lt.
Á: as *á* in f*á*r.
I: as *i* in f*i*t.
Í: as *i* in mach*i*ne or as *ee* in f*ee*ding.
U: as *u* in p*u*ll.
Ú: as *u* in r*u*le or *oo* in p*oo*l.
E: as the first *e* in th*e*re, *ai* in p*ai*n, or the Frech *é*.
O: as *o* in g*o*.
Oi: as *oi* in her*oi*ne, or as the Greek dipthong *oi* in *poimen*, a shepherd.
Ou: as *ou* in *ou*t.
Oy: as *oy* in j*oy* or b*oy*.
Kh: as *kh* in blac*k*-*h*ole.*
G: as *g* in *g*ew*g*aw.
Gh: as *gh* in bi*g*-*h*ouse.*
Ch: as *ch* in *ch*alk.
Chh: as *chh* in mu*ch*-*h*aste.*
Jh: as *geh* in colle*ge*-*h*all.*
T: as *t* in *t*alk, or soft as in *tu* (Italian or Portuguese.)
Th: as *th* in ho*t*-*h*ouse,* or soft as in *tho*roughly.
D: as *d* in *d*aw, or soft as in *da* (Portuguese.)
Dh: as *dh* in goo*d*-*h*ouse,* or soft as the last aspirated.
Ph: as *ph* in *Ph*ear.
Bh: as *bh* in Ho*b*-*h*ouse.*
Y: as *y* in jo*y* or bo*y*-hood.
W: as *w* in d*w*arf.
Sh: as *sh* in *sh*ot.
S: as *s* in *s*oft or in *s*ugar.

ABBREVIATIONS.

B. L. R.	For Bengal Law Reports.
Bom. H. C. R.	„ Bombay High Court Reports.
Cal.	„ Calcutta.
C. R.	„ Civil Rulings.
C. J.	„ Chief Justice.

* When pronounced together or indistinctly.

Chap. or Ch.	„	Chapter.
Coleb. *Dá. bhá.*	„	Colebrooke's translation of the *Dáya-bhága.*
Coleb. Dig.	„	Colebrooke's Digest of Hindú Law.
Con. H. L.	„	Sir Francis Macnaghten's Considerations on the Hindú Law.
D. Ch.	„	Dattaka Chandriká.
D. Mí.	„	Dattaka Mímánsá.
Dec. or D.	„	Decisions or Decrees.
Elb. In.	„	Elberling's Treatise on Inheritance, &c.
H. C.	„	High Court.
H. C. A.	„	High Court in its Appelate Jurisdiction.
H. C. O.	„	High Court in its Original Jurisdiction.
Ind. L. R.	„	Indian Law Reports.
J.	„	Judge or Puisne Judge.
Mad. H. C. Rep.	„	Madras High Court Reports.
Macn. H. L.	„	Sir William Macnaghten's Principles and Precedents of Hindú Law.
N. W. P.	„	North Western Provinces.
P.	„	Page.
Para.	„	Paragraph.
P. C.	„	Privy Council.
Pref.	„	Preface.
S. C.	„	Supreme Court.
Seri.	„	Series.
S. W. R.	„	Sutherland's Weekly Reporter.
Sect. or Sec.	„	Section.
Smri. Chan.	„	Smriti-chandriká.
Str. H. L.	„	Sir Thomas Strange's Hindú Law.
S. D. A.	„	Sudder Dewanny Adawlut.
V.	„	*Vachana*, Verse or *Versus.*
Vi. Chi.	„	Viváda-chintámani.
Ví. Mi.	„	Vír-mitrodoya.
Vol.	„	Volume.
Vyav. Mayú.	„	Vyavahára-mayúkha.

VYAVASTHÁ-CHANDRIKÁ.

BOOK I.
ON OWNERSHIP, RIGHT, HERITAGE, &c.

CHAPTER I.
ON OWNERSHIP, RIGHT, AND HERITAGE.

SECTION I.
On Ownership and Proprietary Right.

1. An owner is by inheritance *(a)*, purchase, partition *(b)*, seizure *(c)*, or finding *(d)*. Acceptance *(e)* for a *Bráhmana*, conquest for a *Kshatriya*, gain for a *Voishya* and *Shúdra* are additional (causes of property and ownership).*—Goutama. Vyavasthá.

"These eight, says Goutama, are causes of property and ownership, not possession and enjoyment."—*Mit. Sans.* p. 41.

(a) '*Inheritance.*'] Gain by inheritance; that is, a right which a son or the like acquires by birth over property of the father or the like. Goutama explains in the following passage the origin of the son's title to the paternal estate:—"The venerable teachers direct that ownership to wealth is acquired by birth alone." —*Smri. Chan.* Chap. I, Cl. 27. Explanation.

(a) Unobstructed heritage is here denominated "inheritance." —*Mit. In.* Chap. I, Sect. i, § 13. Explanation.

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* *Mit. In.* Chap. I, Sect. i, § 8;—and *Smri. Chan.* Chap. I, Cl. 21.

(b) 'Partition' intends heritage subject to obstruction.—*Mit. In.* Chap, 1, Sect. i, § 13.

(b) "*Partition.*"] Partition which confers a special or exclusive ownership on the sons, and the like, over the paternal estate.—*Smri. Chan.* Chap. I, Cl. 27.

(c) 'Seizure or Occupation' is the appropriation of water, grass, wood and the like not previously appertaining to any other (person as owner.)—*Mit. In.* Chap. 1, Sect. i, § 13. *Vide Smri. Chan.* Chap. I, Cl. 27.

(d) 'Finding *(adhi-gama)*' is the discovery of a hidden treasure or the like.—*Ibid.*

(e) '*Acceptance*' is an additional mode of acquisition exclusively appertaining to a *Bráhmana.* Likewise, for a *Kshatriya,* what is obtained by victory is peculiar. *Nirvishtam,* or what is gained in the way of hire by agriculture and the like, is for a *Voishya* peculiar, and so is for a *Shúdra, Nirvishtam,* or what is earned in the form of wages by doing service to the regenerate. Thus, the meaning of the law of GOUTAMA, prescribing the several modes of acquisition, must be understood.—*Smri. Chan.* Chap. I, Cl. 27.

(e) For a *Bráhmana,* that, which is obtained by acceptance or the like, is additional; not common (to all the tribes). 'Additional' is understood in the subsequent sentence : for a *Kshatriya,* what is obtained by victory, or by amercement or the like, is peculiar. In the next sentence, 'additional' is again understood : what is gained or earned by agriculture, keeping of cattle, (traffic,) and so forth, is for a *Voishya* peculiar; and so is, for a *Shúdra,* that which is earned in the form of wages, by obedience to the regenerate and by similar means.—*Mit. In.* Chap. 1, Sect. i, § 13.

Thus likewise, among the various causes of property which are familiar to mankind, whatever has been stated as peculiar to certain mixed classes in the direct or inverse order of the tribes, (as the driving of horses, which is the profession of the *Sútas,* and so forth,) is indicated by the word "earned" *(nirvishta):* for all such acquisitions assume the form of wages or hire; and the noun *(nirvésha)* is exhibited in the *Trikándi** as signifying wages.—*Ibid.*

* The dictionary of AMARA SINHA in three books *(Kándas.)* The passage here cited occurs in the 3rd book of the *Amara-kosha.* Chap. 4, v. 217.

If these reasons exist, the person is owner.* These being known (to exist) he is acknowledged to be the owner or proprietor.† Conclusion.

If these reasons exist, the son, &c., the purchaser, the sharer, the seizer, and the finder, become respectively the owners of the property derived from the father, and the rest, sold, divided, seized and found.—*Smri. Chan.* Chap. I Clause 27.

2. Acquisition made through any of the virtuous or popular means recognized by the world produces Ownership and Proprietary Right. *Vyavasthá.*

There are seven virtuous means of acquiring property: succession, gain (*lábha*)‡ and purchase or exchange, *which are allowed to all classes*; conquest, *which is peculiar to the military class*; lending at interest (*prayoga*), husbandry or commerce (*karma-yoga*,) *which belong to the mercantile class*; and acceptance of presents *by the Sacerdotal class* from respectable people (*f*).—MANU, Chap. X, *Vachana* 115. Authority.

(*f*) Seven means of acquiring property, *viz.*, inheritance and the rest, are said to be virtuous. 'Inheritance'—wealth by descent; gain (*lábha*)‡—gain of a hidden treasure or presents from friends

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* Coleb. *Mit. In.* Chap. I, Sect. i, § 13.

† The original of this passage is "*Jnáteshu jnáyate swámí*," (Mit Sans. p. 170), the literal rendering of which would therefore be—"These being known, he is known to be the owner." Mr. Colebrooke, however, has rendered the passage by—"If they take place, he becomes proprietor." See his Translation of the *Mitákshará* Chap. I, Sect. i, § 13.

‡ Sir W. Jones renders the word "*lábha*" by 'occupancy or donation' which seems to be at variance not only with the lexicographical meaning of the word, but also with the interpretations of the Commentators,—more especially with that of *Kullúka-Bhatta*, whose Commentary he has implicitly followed in his translation, and from which he has supplied the inuendoes put in Italics as in the translation of the above text. (See his Preface p. xv.) *Kullúka-Bhatta's* first interpretation of the word '*lábha*' is the same as that of '*adhi-gama*' used in the text of GAUTAMA already cited (pp. 1 & 2,) which Mr. Colebrooke renders by 'finding'; and then according to the interpretation given in the Mitákshará, he (Mr. Colebrooke) says :—"*finding* is the discovery of a hidden treasure." (See *ante*, p. 2). The other interpretation given by *Kullúka-Bhatta* of the word '*lábha*' is 'presents from friends and the like.' A translation of *Kullúka-Bhatta's* Commentary on the above text is therefore given just below the text itself, in order that the reader may see and judge for himself.

and the like, these three are the virtuous means of acquisition for all the four classes. Wealth (gained) by victory is a virtuous acquisition for a *Kshatriya* on account of (its being obtained by) conquest. The investing of wealth at interest &c., (*prayoga*), also agriculture and trade or commerce, are the virtuous means (of acquisition) for a *Voishya.* 'The acceptance of a gift or present is a virtuous means (of acquisition) for a *Bráhmana.*—*Kullúka-Bhatta's* Commentary on the above text.

Authority. If it be asked then, what rule is there to show that such a mode of acquisition has been recognized by the world, and such a mode has not? the same author (BHAVA-NÁTHA) states: " A *Smriti* or code of law, like Grammar and the rest, has been framed in order to show what are the rules established in the world from the earliest period." The purport is, that such modes of acquisition alone as have, from the beginning, been recognized by the world, are capable of conferring ownership; that they are necessary to be learnt in order to ascertain how property can be acquired in both wordly and religious matters; and that, therefore, with the object of showing what are the modes of acquisition, thus recognized by the world, the Institutes of law (*Dharma-Smriti*) framed by GAUTAMA and others set forth :—" An owner is by inheritance, purchase, &c."—*Smri. Chan.* Chap. I Clause 27.

Authority. It cannot be alleged that ownership *(swámyam)* is but nominally said to be deducible from the *shástra,* for, the reason why it should be considered as deducible from the *shástra* has been set forth by SANGHRA-KÁRA in the following passage. " One cannot be the owner of a property, simply because he is in possession of it, for, does it not occur that possession by one of another's property is obtained even by theft or other nefarious means? Therefore, ownership is deducible from the *shástra* alone, and not from mere possession." The meaning of this passage is that a thing cannot be concluded to be the property of one simply because it remains in his possession, for, if so, one that obtains possession of another's property by theft or the like, would have also to be called the owner of such property.—*Ibid,* Cl. 24.

The following are the principal means of acquisition, to which persons can have recourse in times of distress :—

what is gained by infringing restrictions is property,"—that the author meant that what is gained even by any nefarious means is also property; inasmuch as, he himself has denied that it is so, by saying—"It should not be alleged, that even what is obtained by robbery or other nefarious means would be property. For, proprietary right in such instances is not recognized by the world, and it disagrees with received practice."—*Mit. In.* Chap. I, Sect. i, § 11.

So, what is deducible or inferrible from the above passage is that—

Vyavasthá. **4. Any thing which is acquired by honest means is the property of its acquirer, the same being recognised by the world; and such acquisition produces both his Ownership (*Swámya*) and property or Proprietary right (*Swatwa*) according to received practice.**

Proprietary right defined. **5. Proprietary right in a thing consists in the capability of its being alienated at will by its acquirer.**

Annotations.

5. SANGRAHA-KÁRA, adverting to '*swatwa,*' proceeds to describe how both '*swatwa,*' and '*swámya,*' are inferrible from the *Shástra* alone. "A thing cannot be said to be the property (*swatwa*) of a man, simply because he can, at will, exercise the power of alienation over the same, for, alienation of every thing is subject to the restrictions of law." The meaning of this passage is :—one cannot argue 'I do not say that a thing is the property (*swam*) of one, because it is in his possession, but I say that a thing over which the power of alienation may be exercised by one at will is his property. This cannot be said to be a fallacious reasoning, for, a thing usurped and the like are not to be alienated at will, and cannot, consequently, be called the property of the usurper, and the like.' DHÁRESHWARA SURI also maintains the same principle.—*Smri. Chan.* Chap. I, Cl. 24.

We do not call *that* the property of one over which he can perform the act of alienation at will *(Yatheshta Viniyojyam),* but we call *that his* property which is *capable* of being alienated (by him) at will *(Yatheshta Viniyogárhxm).* *Smri. Chan.* Chap. I, Cl. 25. Authority.

Even if there should be no such act as alienation at will, a thing may be called capable of being alienated at will. Accordingly BHAVA-NÁTHA, in his *Nyáya-viveka,* says, "That which was acquired by one is to him capable (of being alienated at will.)" The particle "*Cha,*" used in the above passage of BHAVA-NÁTHA, is intended to denote that, in his opinion, capability to be alienated at will admits of being defined just in the same manner as "*Swatwa*" or property does. To avoid supposing that if so, a property obtained by theft would be also capable of being alienated at will by the thief, the same author (BHAVA-NÁTHA) adds, "The modes of acquisition by birth, &c., are the modes recognized by popular practice." The meaning is, that such acquisitions only as are made by birth, purchase, partition, seizure, finding and the like, are recognized by the world, and they alone* confer ownership and not an acquisition made by theft or the like.—*Smri. Chan.* Chap. I, Cl. 27. Authority.

Property *(Swatwa)* too, like ownership *(Swámya,)* must be understood to be deducible from the *shástra* alone, *Swámya* and *Swatwa*† being both of the same quality, and the arguments urged in reference to one of them to show that it is deducible from the *shástra* applying with equal force to the other.—*Smri. Chan.* Cl. 24. Observation.

* Here in a note, the learned Translator of *Smriti-chandriká* says :—"This is opposed to the principle of *Mitákshará,* which maintains that even what is gained by infringing the restrictions is property" (*Smri. Chan.* Chap. I, Cl. 27. Note). But such is not exactly the case, see *Vyavasthá* No. 4, and the passages just above it.

† Property *(Swatwa)* has reference to the thing, and ownership *(Swámya)* to the person. The relation which a thing bears to its owner is called "*Swatwa,*" and the relation which an owner bears to his property is called "*Swámya.*"

SECTION II.

On Heritage, &c.

According to the *Mitákshará, &c.*

6. The term 'heritage' (*dáya*) signifies *that* wealth which becomes the property of another, solely by reason of relation(*a*) to the owner.—*Mit.* Chap. I, Sect. i, § 2.

Explanation.

(a) The expression "solely by reason of relation to the owner"—obviates the possible use of the word 'heritage' in speaking of gift and the like. *That* relation, originating from birth, study, marriage, and so forth, is filiation, fellowship in study (of the *veda*), conjugal union or the like.—*Vide* Coleb. Dig. (Lon. Ed.) Vol. II, p. 517.

NÍLA-KANTHA says :—" Wealth not re-united nor put back again into a common stock, and (still) admitting of partition, is 'Heritage.' By '*not re-united,*' I mean to exclude wealth (never before joint, and now first) united for purposes of gain or the like, because the term 'partition of heritage' does not apply to dividing of (wealth) thrown together by merchants. In like manner, we must also exclude re-united property, in the sense in which that term will hereafter be defined. Even as (we find) in the *Smriti-sangraha:* 'That which is received through the father *(b)* and that received through a mother, are described by the term 'Heritage :' The partition of it is now related.' And in the *Nighantu* it is said: 'The learned define heritage to be, wealth of a father *(b)*, which admits of partition.' "—*Vyav, Mayú.* Chap. IV, Sec. ii, § 1.

(*b*) The word '*father*' is merely put to denote relations in general as a part for the whole.—*Ibid.*

Annotations.

6. The term "*dáya,*" signifies proprietary right in wealth (acquired) solely by reason of relationship to (its) owner. Thus the NIGHANTU-KÁRA : "Sages call a *father's* wealth, liable to partition, '*dáya*' (heritage)." *Vir. Mi. (Sans.)* p. 160.

Here also the term '*father*' is indicative of any relation, the word '*dáya*' being applicable in the case of other relatives also.—*Ibid.*

So also DEVÁNANDA BHATTA :—" If it be asked what is the wealth called '*heritage* (*dáya*),' the NIGHANTU-KÁRA (the Lexicographer) says,—'The Learned define *heritage* to be the wealth of a father, which admits of partition.' The meaning is, the Learned call by the name '*Dáya*' (heritage) the wealth descending from the father *and the like,* and which admits of partition. Hence DHÁRESHWARA describes 'heritage' as follows :—' By *heritage* is meant *that* wealth which descends either from the father or from the mother.' The particle '*Cha*' used in the above text of DHÁRESHWARA shows that the property inherited from others, besides the father and mother, is also included in the term 'heritage.' "—*Smri. Chan.* Chap. I, Cl. 3—6.

The *Mitákshará* defines the term 'heritage (*dáya*)' to be wealth which becomes the property of another solely by reason of relation to the owner.* This is not right, (as) in such a case the objection (that would arise) is, that the term '*dáya*' would be applicable to the husband's wealth, which becomes property of the wife by reason of (*her*) relationship to the husband.† This, however, is opposed to the *Veda,* which declares females incompetent to inherit.‡ Our opinion, therefore, is, § that—

According to the Smriti-chandriká &c.

7. The term 'heritage' signifies only *that* wealth *which is capable of partition (c)* and which becomes

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Annotations.

7. Since the partition, which takes place in respect of partible property devolving from a father on his sons, is called 'partition of heritage'; it follows that such property is (*dáya*) 'heritage'; and

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* *Ante* p. 8, *Vyav.* 6.

† This is according to the text "wealth common to the married pair." See Coleb. Dig. (Lon. Ed.) Vol. III, p. 488.

‡ This text of the *Veda* applies not to widowed wives, not also to daughters, mother, grandmother and great grandmother, who, as exceptions to the above, do inherit under special texts. See Coleb. Dig. (Lon. Ed.) Vol. III, p. 528.

§ *Smriti Chan. Sans.* p. 22.

the property of another solely by reason of relation to the owner.*—*Smri. Chan.* Chap. IV, Cl. 11.

(c) "*Capable of partition,*"—that is, liable to be partitioned by the heirs possessing a pre-existing heritable right as well as a right to enforce a partition.†

Consequently,—

Vyavasthá. **8. The share or property which is received by a wife, mother or grandmother upon a partition being made (by heirs), is not 'heritage,' she having had no pre-existent heritable right, nor a right to enforce the partition, and the portion received by her being given her by way of maintenance, and not inheritance.†**

Authority. The wealth of a wife or widow, (which is) not liable to partition, is not 'heritage.' Accordingly a *strí-dhana* derived from the husband is always impartible; division of property between husband and wife never being seen in the world, and HÁRÍTA having declared that 'partition does not take place between a wife and her lord.' It must, therefore, be understood that a mother is entitled not to a partition of

Annotations.

since the term 'heritage' is also used to signify property of which no partition is made : participation, not partition, is strictly intended.—Coleb. Dig. (Lon. Ed.) Vol. II, p. 503.

8. The result of much discussion as to the interest that the wife has in partition by, or in the life of, the husband, is, that it is incidental ; it not being competent to her to claim it in her own right.—Stra. H. L. Vol. I, (2nd Ed.,) p. 188.

* Kristna-Swamy Iyer's translation of the above paragraph of the *Smriti-chandriká* contains many more words, owing perhaps to the passage of the manuscript copy (in Sanscrit) from which that translation was made containing more words than the passage in the printed copy, of which the above is a translation, and which is to be found at page 22 of the *Smriti-chandriká* published by the Ex-professor of Hindu Law in the Calcutta Government Sanscrit College.

† See Precedents, pp. 1—5 ; see also Partition.

heritage in adjustment of a pre-existent right, but simply to take so much of the wealth as she stands in need of. Hence, such a mother alone as is destitute of wealth, and not a mother generally, is declared in another *Smriti* or (book of) law to be entitled to receive a share. "A mother, if she be dowerless, shall, in a partition by sons, take an equal share."—*Smriti Chan.* Chap. IV, Cl. 11 & 12.

Explanation. The meaning is that, during partition by sons, subsequent to the decease of the father, the mother will take an equal share, only where she has no dower, *i. e.*, her own separate property. The word 'mother' includes a step-mother, it being said by VISHNU, "mothers receive allotments according to the shares of sons." By the qualifying terms 'if she be dowerless,' made use of in the text, (para. 12,*) it is inferrible that where a mother, by means of her own separate property, is able to maintain herself and perform such religious duties (requiring for their accomplishment the use of wealth) as are observable by her, she can take no share out of her husband's property. If the separate property of a mother be insufficient for the above purposes, then she, notwithstanding her possession of such property, is to take a share, which, however, is not to be equal to that of a son, but less than that, and proportionate to her wants. Accordingly, where the estate forming the subject of partition is large, the mother, though destitute of separate property, is not to take an equal share, but such an inferior share as may be sufficient to meet her own wants. The condition imposed by the expression—'If she be dowerless'—shows that the taking of a share by the mother is on account of her necessity, and not by right of inheritance, as is the case with brothers. By a mother taking, not a fixed share but only so much as she stands in need of, the word 'equal' used in the text, (para. 12,*) is not rendered useless; for, the word serves to debar her, where the partible estate is small, from claiming more than the share of a son, on the score of its being needed by her. - *Ibid.* Cl. 13—17.

As to what is said by VISHNU (para. 7,†) that daughters too are entitled to allotments according to the shares of sons, there also it must be understood that this is not by right of inheritance, as in the case of brothers, but simply for the purpose of defraying the expenses of their marriages. The reasons are,—1stly, Because they possess no right of inheritance in respect of a property, which, though they

* Of the *Smriti-chandriká.* † Of the *Smriti-chandriká.*

have acquired an interest in it by birth, has not become their independent property, (notwithstanding the demise of the father) from its being partible not among them, (but among the sons only.)—2ndly, Because the adjective 'unmarried' is used in the text of VISHNU (para. 7,*) before the word 'daughter.'—*Ibid.* Cl. 18.

Vyavasthá. **9. But, where on the extinction of an owner's right, a woman, by right as an heiress, takes his wealth, *that* is certainly 'heritage (*dáya*),' because that is not given her as *maintenance*, but taken by her as *inheritance*.**

Authority. That is declared by the author of the *Vír-mitrodoya* in the interpretation of this text of NÁRADA—"Where a division of paternal estate is instituted by sons, that becomes a topic of litigation called by the wise *partition of heritage*." 'Paternal,' 'by sons,' both these expressions indicate relation in general, since that is determined in respect of a *widow and others* also concerning the wealth of a husband and the rest.—*Ví. Mi.* (*Sans.*) p. 159.

Vyavasthá. **10. Heritage is of two sorts: unobstructed [*a-prati-bandha*(*d*)], and liable to obstruction [*sa-prati-bandha*(*e*)].†—*Mit.* Chap. I, Sect. i, § 3.**

Explanation. (*d*) The wealth of the father or of the paternal grandfather, becomes the property of his sons or of his grandsons in right of their being his sons or grandsons; and *that* is an inheritance not liable to obstruction.—*Ibid.*

(*e*) But property devolves on paternal uncles, brothers and the rest, upon the *demise* of the owner, if there be no male issue; and thus the actual existence of a son and the survival of the owner are impediments to the succession; and on their ceasing, the property devolves (on the successor) in right of his being uncle or brother (as the case may be). *This* is an inheritance subject to obstruction. The same holds good in respect of their sons and other descendants.—*Ibid.*

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* Of the *Smriti-chandriká*. † *Vide* Precedents, pp. 6 & 112.

(*d. e.*) NÍLA-KANTHA'S description of the above is more perspicuous:—"This heritage is of two kinds, obstructed, and unobstructed: when the life of the owner of the property or that of his sons, or other (heirs), is interposed, *that* (property) is termed obstructed (heritage); for instance, the wealth of uncles and the like. But where ownership accrues to sons, or other (next heirs), solely from affinity to the owner, without reference to other means of acquiring property, (the heritage) is then unobstructed, as the wealth of a father.—*Vyav. Mayú.* Chap. IV, Sec. ii, § 2. Further Explanation.

(*d. e.*) MITRA MISRA is still more perspicuous. He says, "This heritage is of two kinds: 'unobstructed (*a-prati-bandha,*) and obstructed (*sa-prati-bandha*).' The (heritable) right of a son and the rest in the wealth of a father and the rest being created by relation as son and so forth, *that,* notwithstanding the existence of the owner, is their unobstructed heritage, their right having been generated by birth, and the same not being obstructed by the existence of the owner. But as to the wealth of a separated and un-re-united son dying without a son, which becomes the heritage of his father, brother and the rest, *that* is obstructed (heritage), because *there* the existence of the owner was the obstruction to (their) right being accrued.*—*Ví. Mi.* (*Sans.*) page 160. Ditto.

11. Where a division of the paternal *(f)* estate is instituted by sons *(g)*, *that* becomes a topic of litigation called by the wise 'partition of heritage.'—NÁRADA.† *Dáya-bhága* defined.

(f) 'Paternal' here implies any relation, which is a cause of property.—*Mit. In.* Chap. I, Sect. i, § 5.

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* Thus the heritable pretension of the son of a Hindú being immediate is "(*a-prati-bandha*)—a heritage not liable to obstruction," answering with us, to the heir apparent, whose right, if he outlive his ancestor, is indefeasible; while that of remoter heirs, as of brothers, uncles, and others, is distinguished, as being liable to obstruction, (*sa-prati-bandha,*) by the intervening birth of nearer ones, so that their title is not apparent, but presumptive only.—Stra. H. L. (2nd Ed.) Vol. I, p. 131.

† Mit. In. Chap. I, Sec. i, § 5;—*Vyav. Mayú.* Chap. IV, Sect. iii, § 1;—*Ví. Mi.* (*Sans.*), p. 521.

'Father and son' indicate any relation, since it is applicable also to the property inherited by a widow and others from their husband and the rest.—*Vi. Mi.* p. 159.

(g) The word '*sons*' includes (by synecdoche) grandsons, and the rest.—*Vyav. Mayú.* Chap. IV, Sect. iii, § 1.

SECTION III.

Heritable Right and the cause thereof.

It has been shown, that property (proprietary right) is a matter of popular recognition; and the (heritable) right of son's and the rest, by birth, is most familiar to the world, as cannot be denied.—*Mit. In.* Chap. I, Sect. i, § 23.

This maxim, that the grandfather's own acquisition should not be given away while a son or grandson is living, indicates a proprietary interest by birth.—*Ibid.*, § 24. Therefore,—

Vyavasthá. **12. It is a settled point that property (*i. e.*, heritable right) in the paternal or ancestral estate is by birth (*a*).*—*Mit. In.* Chap. I, Sect. i, § 27.**

Annotations.

12. In fact, property is temporal,—the received practice in the world is, that the ownership or right of a son and the rest in the wealth of a father and the rest is generated immediately upon the birth of the former.—*Vi. Mit.* (*Sans.*) p. 163.

That an indefeasible inchoate right is created by birth, seems to be universally admitted, though much argumentative discussion has been used to establish that *this* alone is not sufficient to create proprietary right.—Macn. H. L. Vol. I, p. 2.

The inchoate right, that has been alluded to, renders the sons, as has been seen, in some sort, co-proprietors with the father of the family property, to the extent of giving them, under particular circumstances, claims upon it in his life, which consistently with the

* See Vyavasthás, 28, 29 and the authorities &c. relative thereto, see also Precedents, pp 6—16 and 42.

GOUTAMA explains in the following passage the origin of the son's title to the paternal estate—"The venerable teachers direct that ownership to wealth is acquired by birth alone." (a)—*Smri. Chan.* Chap. I, Cl. 27. Authority.

(a) "By birth alone." By the very formation of the fœtus in the mother's womb.—*Ibid.*

According to DHÁRESHWARA-ÁCHÁRYA,—The ownership of sons and the rest, in the wealth of the father is not generated previously during his life, but is produced by partition. And the author of *Smriti* says the same. But it is not so; for, from the plain sense of this text: "*Even* by birth, ownership in wealth is obtained,"* and from other similar ones, it is evident, that, ownership in the father's wealth, depending on the filial relation, is generated even by the production of a son.—*Vyav. Mayú.* Chap. IV, Sec. i, § 3.

Annotations.

spirit and intention of the law, it is not in his power altogether to bar. Vesting in them, however, by birth, they attach more upon *that* part of it which has been inherited by him, than upon what he may have himself acquired; the title to property descended from ancestors being considered to be in him and them, so far the same, that, upon partition by him taking place, the law regulates the distribution; whereas, with regard to the rest of what he possesses, it leaves it more at his discretion.—Stra. H. L. Vol. I, (2nd Ed.) pp. 177, 178.

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* This text is to be found also in the *Mitákshará* (Chap. I. Sec. i, § 27), where its learned Translator (Mr. Colebrooke) seems to have inadvertently omitted the translation of the Sanscrit word "*eva* (even, alone, or only)." The same is, however, rendered by the Translators of the *Vyavahára-mayúkha* and *Smriti-chandriká.* But the former has translated it by '*even*,' and the latter by '*alone*.' Mr. Colebrooke, moreover, says that the above text is not to be found in GOUTAMA'S Institutes. Nevertheless, it is to be found not only in the *Mitákshará*, but also in the *Vyavahára-mayúkha, Smriti-chandriká, Dáya-bhága, Viváda-bhangárnava,* and many other books of authority. The last is translated by Mr. Colebrooke himself, and *there* the word "*eva*" is rendered by '*only*.' (See Coleb. Dig. Vol. II, Lon. Ed. p. 508.) The reader will be surprised to learn that the printed Institutes of the sages do not contain several of their texts which are to be found in the Digests and other works of undeniable authority.

Vyavasthá. 13. From the foregoing texts, *viz.*, "property (that is heritable right) in the paternal or ancestral wealth is by birth," and "ownership of wealth is acquired by birth *alone*,"* it follows that a son and grandson, whose heritable right accrues by birth, have no heritable right in, or claim to, such property as was paternal or ancestral, but has been disposed of before his birth.†

Vyavasthá. **14. By 'birth'‡ is here to be understood also the fœtal existence of a son or son's son, though his coming out of the mother's womb must be awaited.§**

Reason. Because, if the issue be a male and alive, it would at once succeed, if a daughter, she may or may not succeed (as the case may be), whilst a still-born child would not in any case affect the succession to the inheritance.

Authority. VASHISHTHA :—A share of the heritage with the brothers shall be allotted to those widows (*i*) who have no offspring, but are supposed pregnant, *to be held by them* until they (severally) bear sons.—Coleb. Dig. Vol. III. (Lon. Ed.) p. 86.

Annotations.

14. It is not necessary that the heir should be actually born ; it is sufficient that he was begotten and afterwards born with vitality : when born with vitality, it is of no moment how soon after the child may expire ; the right of inheritance is acquired, and the inheritance devolves on the heirs of the child.—*Elb. In.* Sect. 84.

14. If a widow of a deceased co-heir happen to be pregnant at the time of his death, or be supposed to be so, either partition should wait, or a share should be set aside, to abide the contingency of her having an after-born son ; failing which, it reverts, and is distributable subject to the maintenance of the widow.—*Stra.* H. L. Vol. I, (2nd Ed.) page 207.

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* See *ante*, pp. 14, 15. † See Precedents, pp. 6, 15, 49, 72.

‡ In page 14.

This (i. e. birth) is two-fold. It might be referred to the period of conception, or to actual production.—Sel. S. D. A. Rep. Vol. V, p. 44. Note.

§ See Precedents pp. 15, 16, and *Vyavasthá Darpana*, (2nd Ed.) pp. 6—9.

(i) Widows here signify wives of deceased brothers. If they be supposed likely to bear sons, shares must be also allotted to them : consequently, the meaning is that shares are only allotted to the widows *for the behoof of their sons* (to be born).—Coleb. Dig. Vol. III, (Lon. Ed.) Page 86. Explanation.

At the time of partition a share must be reserved *for the sons* of the widowed wives of the brothers, who are pregnant by their husbands, until the delivery of children; and if no male issue be produced, the above-mentioned shares should be taken by them, that is, by the living brothers: such is the meaning.*—*Vi. Chi.* p. 292. Explanation and Authority

Although the child in the womb does not inherit, yet it suspends (for a time) the succession to the property to which it would succeed, (if born a male and alive;) for, were it held otherwise, (that is, if any inheritance or property were vested in the child *in utero* immediately after the extinction of the owner's right,) then, on its dying *in utero,* or abortion taking place, its own heir would inherit and not the heir of the owner, but this is inconsistent with the law and contrary to usage.† Remarks.

15. The property which a child in the womb is to inherit on its being born a male and alive, should, however, be deposited with his next friends (*bandhus* and *mitras*) for safe custody until he attain majority.‡ *Vyavasthá.*

KÁTYÁYANA:—Let them deposit, free from disbursement, with *bandhus* and *mitras* the property of such as have not attained maturity, as well as of those who are absent. Likewise the property of minors should be preserved until they Authority.

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* The rule will, however, be complied with if the child is fœtally in being, that is to say, *conceived* and in the mother's womb. On this stand the undoubted rights of a posthumous son, which are admitted by all the schools and all the commentators. By "posthumous" a son is meant as conceived at the date of the ancestor's death, in contradistinction to one not so conceived.—2 Nort. L. C. p. 422.

† A child in the womb takes no estate. In cases where, when the succession opens out, a female member of the family has conceived, the inheritance remains in abeyance until the result of the conception can be ascertained. If the child be still-born, the estate goes not to its heir, but to the heir of the last owner. Part of the decision in the case of *Musst. Goura Chowdrain* v. *Chummun Chowdry.*—Suth. for 1864, c. r. p. 340.

‡ See Partition, and the Chapter on Minority and Guardianship.

attain their full age.—*Vir. Mi. (Sans.)* p. 182. *Vide Dá. Bhá.* (Coleb.) Chap. III, Sect. i, § 17.

Vyavasthá. **16. The term "birth,"* comprehends also the adoption of a son.†**

Reason. Because, by adoption, the adopted is born again in the family of the adopter, and is thereby vested with heritable right in the estate of his adoptive father and grandfather; and from the moment of his adoption he (with his adoptive father) becomes the co-owner of such estate just as a legitimately begotten son is by, and from, his birth.

Vyavasthá. **17. The expression "property in the paternal and ancestral estate is by birth"* is taken and held to imply that the great-grandson, whose father and grandfather are dead, has also, by birth, a right in, and to, the estate of his great-grandfather.‡**

Annotations.

16. An adopted son is a substitute for a son of the body, where none such exists, and is entitled to the same right and privileges. *Macn.* H. L. Vol. I, p. 18.

When he who has procreated a son gives him to another, and that child is *born again* by the rites of initiation, then his relation to the giver ceases, and relation to the adopter commences.—Coleb. Dig. Bk. V. Chap. IV, *v.* 183.

The theory of an adoption is a complete change of paternity; the son (adopted) is to be considered as one actually begotten by the adoptive father, and he is so in all respects save an incapacity to contract marriages in the family from which he was taken.—Mad. H. C. R. Vol. I, p. 420.

17. The right of representation is also admitted, as far as the great-grandson; and the grandson and great-grandson, the father of

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* In *Vyavasthá* 12.

† See Precedents pp. 16—19; see also Adoption.

‡ Only the sons of a deceased, including the adopted son, are *certain* to succeed, and their succession, therefore, is called unobstructed (*a-pratibandha*), the 'issue' including sons grandsons (son's sons), and great-grand sons (through grandsons.)—Norton's Leading Cases, Part ii, p. 495.

See post, pp. 34, 47, also Chap. 1, and Sections 1—VI of Chap. II, Book II, also Partition, and Precedents, pp. 112, 219, 222, 223, 477, 478, &c.

Because, the term ancestral relates to the property of the ancestors in the second and third degrees as well as in the first degree, and the term *put-tra,* or son, signifies also a grandson and great-grandson (in the male line); and because the great-grandson represents his deceased father and grandfather, and has, by birth, a right in what *they* had a right, as well as in what *they* died possessed of, vested with, or entitled to.* Reason.

The word son, here used, is inclusive also of the son's son and grandson in the male line.—*Da. Mím.* Sect. i, § 13. Authority.

The term 'son (*put-tra*),' here used, is inclusive of the grandson and great-grandson (in the male line); for these equally present oblations of food, and preserve the line.—*Da. Chan.* Sect. I, § 6. Authority.

18. Of those, however, who have no right by birth, the cause of heritable right is the same as *Vyavasthá.*

Annotations.

the one and the father and grandfather of the other being dead, will take equal shares with their uncle and grand-uncle respectively. Indeed the term '*put-tra,*' or son, has been held to signify, in strict acceptation, (also) 'a grandson and great-grandson.'—*Macn.* H. L. Vol. I, pp. 17 and 18.

A son dying in the life-time of the father leaving sons, representation takes place, proceeding as far as great-grandsons; upon the ground of their conferring, by performance of funeral obsequies, equal benefit on the ancestor; the *key* (as observed by Sir William Jones) to the whole Indian Law of Inheritance.—*Stra.* H. L. Vol. 1, (F. E.) page 116.

The collective term *issue* comprehending not only as many sons as a man may chance to leave behind him, but sons' sons also, and the sons of the latter, or great-grandsons.—*Ibid.* 2nd Ed. p. 124.

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* See *Vyavasthá* No. 28 and the Authorities &c., relative thereto; see also Precedents pp. 112, 219, 477 &c.

that of (their) taking the heritage, namely, their survival at the time of the owner's death.*

Authority. Survival at the moment of the owner's death is the only circumstance recognized by law as creating right to inherit the property (of a deceased owner).† Therefore, wherever the property of one dying without issue (male in the male line) devolves on another by reason of the demise of the proprietor,‡ there that (*i. e.* survival) alone is considered as conferring a right on the inheritor to inherit (the property of the deceased).—*Smri. Chan.* Chap. IX, Sect. iii, Clause 5.

Authority. **19. Here, by the term "death,"§ physical death alone is not meant: it alludes also to a person's**

Annotations.

19. There are two occasions, upon either of which, wherever the Hindú law prevails, dominion may be transferred from the father in his life, without his consent, whether the property claimed by the sons to be divided be ancestral or acquired: These are *voluntary devotion*, by which a father is considered as having renounced it, and *degradation* from caste, by which it is forfeited.—Stra. H. L. Vol. I, (2nd Ed.) p. 184.

Not only upon his demise, but upon his renunciation of worldly concerns with a view to ending his days in devotion, or, after

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* Vide Precedents pp. 19–21, 31, 41, 107, 149, also Stra. H. L. 1, (2nd Ed.) p. 145.

† The learned Translator of the *Smriti-chandriká* instead of 'a deceased owner,' has, in the above clause, used the words 'deceased woman'; and the reason for his so doing appears to be, that in the clause just above it woman's property is treated of, but the following Clause (*i. e.* Clause 5) indicating only an inference drawn from the preceding cannot but be a general one; and, that it is actually so, is manifest from the Sanskrit words, *dhana-swámina* (of the owner of property) being used in the masculine gender, and, more especially, from the following or concluding sentence (in Cl. 5); as is expressly mentioned by the Translator himself in the following note, at page 21 of his translation.

‡ "This refers to a proprietor, male or female."—Note by the Translator of the *Smriti-chandriká*.

§ In *Vyavasthá* 18.

(*b*) After withdrawing his affection (from things of this world,) if he abdicate his estate in this form "*let this be no longer mine,*" then indeed property is divested by abdication; and afterwards, even though temporal inclinations revive, the property is not renewed. The resignation can only be known from the declaration of the party.—Coleb. Dig. Vol. II, (Lon Ed.) pp. 525.

Authority. If sons, *outcasts excepted,* entitled to inherit the father's estate, be equal in the possession or destitution of learning or the like, they shall all have equal shares.—*Smri. Chan. Chap.* III, Cl. 2.

Authority. A father, entitled to (exercise) independence or dominion being alive, his will is the cause of partition, but when he is no longer *entitled* to it, by (reason of) being *degraded, a wandering devotee or the like,* the will of (his) son is the cause of partition.—*Vi. Mit.* (*Sans.*) *p.* 171.

"Should the eldest or youngest of several brothers *be deprived* of his allotment at the distribution, or should any one of them die, his share shall not be lost: but his uterine brothers and sisters, and such brothers as were united after a separation, shall assemble together and divide his share equally."—MANU, cited in *Mit. In.* Chap. II. Sect. ix, § 12.

Explanation and Authority Among re-united brothers, if the eldest, the youngest or the middle-most, at the delivery of shares, (for the indeclinable termination of the word denotes any case,) that is, at the time of making a partition, *lose* or *forfeit* his share by his *entrance into another order* (that of a hermit or ascetic) or by the *guilt of sacrilege,* or *any other disqualification,* &c.—*Mit. In.* Chap. II, Sect. ix, § 13.

Explanation and Authority If any of the reunited parceners cannot receive a share, through his death, or *secession from the house-hold order,* &c.—*Vi. Chi.* p. 302.

Authority. Those who have assumed another order (*c*), are excluded from participation.—VASHISTHA, cited in Coleb. Dig. Vol. III, (Lon. Ed.) p. 327.

(*c*) Another order than that of a house-holder.—*Ibid.*

There are four orders; thus *Vámana purána*:—" Four orders are prescribed for *Bráhmanas*: (*viz.*, the order of) the married man keeping house (*grihí* or *grihastha*), the student of the *veda* (*brahmachárí*,) the hermit (*vána-prastha*,) and the anchoret (*bhikshu*, *sanyási* or *yati*.) To *Kshatriyas* also are ordained (the first) three orders; and two (*i. e.* the orders of) the *brahmachárí* and *grihí* for *Voishyas*. The only order to be entered by the *Shúdras* is that of *grihí* or *grihastha*."—See Str. H. L. Vol. I, (2nd Ed.) page 34.

20. Out-casts or men degraded for sin, and persons assuming an order or condition of life other than that of a house-holder, are not, however, considered dead, as to the property acquired by them *after* their degradation or assumption of another order.* *Vyavasthá.*

In fixing the date of a missing person's death, the holy sages (*Rishis*) and compilers are not of one opinion, as is manifest from the subjoined texts cited in the *Nirnaya-sindhu*:—

VRIDDHA MANU:—" So if the time of twelve years of a person's absence has gone by, they shall cause his death-rites to be solemnised at the commencement of the thirteenth year."

VRIHASPATI:—"If no tidings be had of a person for twelve years, such person shall be treated as one *dead* by the burning of his effigy made of *Kusha* grass."

Annotations.

19. Where a share is not desired by a son, it may be effectually waived by his acceptance of a trifle in satisfaction, upon the principle of *quisque potest renunciare juri pro se introducto*; his heirs being bound by his consent. But, without renunciation, it may be still claimed.—*Ibid.* p. 195.

20. In either case, whether of the *out-cast*, or the *devotee*, partition attaches only upon property possessed by him at the time, not upon what may subsequently devolve, or be acquired.—*Stra.* H. L. Vol. I, (2nd Ed.) p. 187.

* See Precedents p. 40; See also Exclusion from Inheritance.

Bhabishya-Puróna:—" If any one's father be absent, and neither a letter nor any news of him be received, then at the end of fifteen years his effigy shall be formed and burnt in the manner prescribed by the law: from that date all his obsequies shall be performed."

It is said in the *Madana-ratna* that (the rule of) waiting for twelve years applies to all missing persons, except to a father.

In the *Grihya-kárika*, however, it is laid down as follows:—" It is said that the obsequies of a missing person in the first period of life, should be performed after the lapse of twenty years, of one of middle age after fifteen years, and of a person in the last period of life (above 75 years) after 12 years (from the day of his or her disappearance.)"*

Of the above doctrines, *that* which is laid down in the *Grihya-káriká* is consistent with reason and therefore preferable in practice according to the ordinances of YÁJNYAVALKYA and VRIHASPATI, which are as follow:—" If two texts differ, reason (or that which it best supports) must in practice prevail."† " A decision must not be made solely by having recourse to the letter of the written codes; since, if no decision were made according to the reason of the law,‡ there might be a failure of justice §

So, according to the text of *Grihya-káriká* cited (as above) from the *Nirnaya-sindhu*,—

Vyavasthá. **21. The death-rites of the missing person, who is in the first period of life, are to be performed**

Annotations.

21. The law has assigned various periods of absence, inferring the conclusion, according to the age of the person in queston at the

* Cited in the *Nirnaya-sindhu.*

† YAJNYAVALKYA. See Colebrooke's Digest, (Lon. Ed.) Vol. III, p. 505.

‡ Or according to immemorial usage; for, the word *Yukti* admits both senses.—*Ibid.* Vol. II, p. 128 : Note.

§ VRIHASPATI. See *Ibidem*, and Macn. H. L. Vol. II, p. 102.

after twenty years; of one in the middle age, after fifteen years; and of one in the latter period of life, after twelve years, from the day of his departure, and then, their heirs become entitled to inherit from them.*

The case of a missing father is, however, an exception to the above rule. It is laid down by JÁTÚKARNA, quoted in the *Nirnoyámrita*, and in the *Bhavishya Purána* and *Madana-ratna* cited in the *Nirnaya-sindhu*, (as above quoted,) that—

22. The time for the re-appearance of a missing father is fifteen years, at the expiration of which his exequial rites must be performed by his son.* *Vyavasthá.*

Annotations.

time of his departure, the lowest being twelve years ; at the expiration of which, without intelligence of him having been received, the heir is entitled to assume the succession keeping certain fasts, then burning an image of his ancestor made of *kusa*, and finally performing for him, in the prescribed form, his funeral rites.—*Stra.* H. L. Vol. I, (2nd Ed.,) page 131.

Sir W. Macnaghten says—"The fact of the ancestor being missing for a period exceeding twelve years, constitutes a legal title to succession on the part of the heirs. This doctrine was recognized in a case decided by the Sudder Dewanny Adawlut, on the 25th of April 1820 : Reports Vol. iii, p. 28, wherein it was determined that twelve years should be allowed for the re-appearance of a missing person, after which his death will be presumed :† but some authorities maintain, that the period varies with reference to the age of the missing person." See Note to Case 7, Vol. ii, p. 9.‡—*Macn.* H. L. Vol. I, p. 2.

* *Vide* Precedents pp. 28—30, 37—39, and 43.

† This being a Bengal case, the principle inculcated therein should be taken to be according to the Hindú law as current in the Bengal school.

‡ This note is to be found in page 39 of the Precedents. *Q. V.*

Vyavasthá. **23. But if a missing person on his return after the lapse of the period allowed for his re-appearance has performed the expiatory penance prescribed by the *Shástra*, then he is not treated as dead, but restored to the rights of the living.***

Authority. Thus the funeral obsequies having been performed by mistake, should the man, (so) dead, ever return, (then) let him perform the rite or sacrifice (called) '*áyushmatí*,' and resume (the performance of sacrifice on) fire.—*Chhándogya-parishishta.*

Authority. The person, whose funeral obsequies have been performed upon his death being heard of, should perform expiation (*c*) according to the *Shástra*, and resume the (performance of sacrifice on) fire." "If he (the missing person) return alive, let (his kin) immerse him in a vessel full of clarified butter, (then) taking him up, let them cause him to be bathed, and his initiatory ceremonies, &c., to be performed. Let his religious rites, which take twelve days or three nights to be completed, be performed: (next) let him perform ablutions and re-marry his wife, or another (girl) in her default. Having consecrated the sacrificial fire, as ordained, let him perform the *Vrátyashtoma* sacrifice or rite. And repairing to mountains, or hills, *there* let him perform the *áyushmati yága* by offering a beast to *Indra*† and *Agni*;‡ and afterwards let him perform also some other sacrifices or rites as he may choose."—VRIDDHA MANU cited in the *Hemádri*. See *Bhavishya Purána*, and *Nirnaya-sindhu*, (*Sans.*) pp. 415 & 416, in which also the above texts are cited.

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* There is a case in East's Notes (No. 85), in which the Pandits declared that "he who has absented himself for the period of twelve years, and of whom no intelligence has been received during that time, must be considered as certainly dead; should he even return after that time, he had forfeited the rights of the living." This being a Bengal case, the period of twelve years must have been declared for the missing person's re-appearance without any reference to his age and relation. But as to his forfeiting the rights of the living, it must have been declared in consideration of his not performing the expiatory penance.

† One of the Hindú deities, who presides over the atmosphere and is regarded as the Sovereign of the (subordinate) deities.

‡ By '*Agni*' is here meant the deity who is the regent of fire.

(c) Here by 'expiation' must be understood the re-performance of the initiatory ceremonies from *Játa-karma* to marriage.—*Hemádri*. Interpretation.

24. As respects the missing person who is not an *agni-hotrí*,* if he return after his funeral obsequies were performed by mistake, he should perform the *Swastyayana*;† but if he return after the mere receipt of the intelligence of his death, then he should perform the *Charu-homa*. Vyavasthá.

But with respect to the (missing) person who is not an *agni-hotrí*,* common *swastyayana*, the worship of HARI and so forth, should be performed.—*Chhándogya-parishishta*. Authority.

But if the (missing) person is not an *agni-hotrí*,* he should perform the *Charu-homa* upon the mere receipt of the intelligence of his death.—*Ashwaláyana*. Authority.

As in the case of co-parcenary, union, or re-union, subsisting, the same goods which appertain to one parcener belong to another likewise, so when the right of one ceases by his demise, those goods belong exclusively to the survivor, since *he* is not divested of his ownership. They do not belong to such heir of his as has no right by birth, since his right could not accrue by reason of the deceased dying without a several right vested in him. In other words, as the deceased had his right in the whole property collectively and indiscriminately with his surviving co-parcener, it ceased at the close of his existence, and as no several or individual right could be created without a partition, he left no such right in the undivided property to devolve on, and vest in, *that* heir of his who had no right by birth, or whose heritable right is not un-obstructed.‡ Therefore,—

25. Upon the death (natural or civil) of an undivided or re-united co-parcener (be he a son, Vyavasthá.

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* *Agni-hotrí*, composed of *agni* (fire) and *hotrí* (*sacrificer*), signifies one who maintains sacrificial fire and performs sacrifice on it.

† The aversion of evil by the recitation of *Mantras*. The benediction of a *Bráhmana* after presentation of offerings.

‡ See *ante*, pp. 12 and 13.

brother, or the like) without a son* his widow and the rest, having no right by birth, have no heritable right in what the deceased had, but the surviving parcener would own the whole joint estate by survivorship.†

Authority. From its being laid down that a widow becomes entitled to succeed where the husband *dies divided,* it is understood that where the husband dies *undivided,* his father, brother, or the like, who lived in union with him, takes the property of the son-less* man.—*Smri. Chan.* Chap. XI, Sect. i, Cl. 25.

Authority. "Therefore, it is a settled rule that a wedded wife, being chaste, takes the whole estate of a man, who being *separated* from his co-heirs and *not* subsequently *re-united* with them dies leaving no male issue."‡ By this dictum of the *Mitákshará* it is implied or rather indicated that, the widow of an undivided or re-united parcener has no heritable right in what her husband had. And she having

Annotations.

25. It is perfectly intelligible that upon the principle of survivorship the right of the co-parceners in an undivided estate should over-ride the widow's right of succession whether based upon the spiritual doctrine or upon the doctrine of survivorship. According to the principles of Hindú law, there is co-parcenership between the different members of a united family, and survivorship following upon it. There is community of interest and unity of possession between all the members of the family, and upon the death of one of them the others may well take by survivorship *that* in which they had during the deceased's life-time a common interest and common possession.—Part of the Privy Council judgment in the appeal of Kattama Nachear *v.* Rajah of Shiva-gunga.—*Vide* Moore's Indian Appeals, Vol. IX, page 611.

* The term 'son or male issue' is inclusive also of a grandson and great-grandson in the male line. See *ante*, pp. 14, 17, 18, 19, 33, 47 and Precedents pp. 68, 112, 219, 477, 478 and 495.

† See Precedents, pp. 19—22, 31—36, 41—43, 149 and 473—485.

‡ *Mit.* In. Chap. II, Sect. i, § 39.

Authority. I. *Veda*:—His-self is truly born a son.—See *Da. Mím*, Chap. IV, § 13.

Authority. II. *Bhárata*:—"He (the son) is (as it were) that very person, by whom produced.—See *Ibid.*

Authority. III. MANU:—The husband, after conception by his wife, becomes himself an embryo, and is born a second time here below, for which reason the wife is called '*jáyá*,' since by her he is born (*jáyate*) again.—Chap. IX, *v.* 5.

Authority. IV. SANKHA and LIKHITA:—Let a priest take the hand of a woman equal in class; the bodies of his ancestors are born again of her. Let him figuratively address his own soul in the person of his son:—"Sprung from (my) several limbs, especially from the breast, thou, my soul, art called '*son*': mayest thou live for a hundred years! For the benefits conferred on parents, thou, my soul, art called 'son;' because thou deliverest (*tráyase*) from the hell called '*put*,' therefore, thou art named '*put-tra* (hell-deliverer.)'" A father is exonerated in his life-time from the debt of his own ancestors, upon beholding the countenance of a living son: he becomes entitled to heaven by the birth of his son, upon whom his own debt devolves.—*Ratnákara.* See Coleb. Dig. Vol. III, (Lon. Ed.,) p. 157. But,—

Vyavasthá. 27. If an undivided proprietor left, at his death, any property *separately* acquired by him, or vested in him, his widow or any other heir (as the case may be) is entitled to

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Annotations.

25—27. On the death of a Hindú parcener, the succession to his rights, with the exception of property *separately* acquired by him, vests in the other remaining members,—his sons, if he leave any, representing him as to his undivided rights, while the females of his family continue to depend on the aggregate fund, and under the general protection, till a *partition* takes place, which may never happen.—*Ibid.* p. 120.

inherit such property, the same not forming part of the joint estate.*

Annotations.

27. In a united Hindú family where there is ancestral property, and one of the members of the family acquires *separate* estate; on the death of that member such separately acquired estate does not fall into the common stock, but descends to the male issue, if any, of the acquirer, or in default, to his daughters, who, while they take their father's share in the ancestral property, subject to all the rights of co-parceners, inherit the self-acquired estate free from such rights.—Part of the Privy Council's Judgment in Kattama Nachear. *Vide* Moore's Indian Appeals, Vol. IX, p. 539.

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* See Precedents, pp. 244—251, and also the Precedents in Daughter's succession.

CHAPTER II.

ON THE EFFECTS OF CO-PARCENARY AND CO-ORDINATE RIGHT, &c.

SECTION I.

On the Extent and Effects of the Right and Power of a Father and Son,* over Ancestral and other Property.

Vyavasthá.

28. In the paternal grandfather's property(*f*) the ownership of the father and son is the same or equal.†

Authority.

YÁJNAVALKYA :—The ownership of the father and son (*a*) is the same in land (*b*) which was acquired by the grandfather(*c*), or in a (*ni-bandha*) corody(*d*), or in (*dravyam*) chattels(*e*), which belonged to him.‡

Annotations.

28. But, though real and personal property so far class together, and are not distinguishable, great importance (as has been already stated) is attached by it to land, in which in particular the sons are considered as possessing a special interest ;—having, with their father, by birth, according to the doctrine of the Mitákshará, prevalent in the Peninsula, and North of India, so far a co-ordinate right in *that* part of it, which is ancestral, that, if he thinks proper to come to a partition in his life-time, (a disposition of property, the particulars of which will be seen in a subsequent Chapter,) he must

* The term "son" is inclusive also of the grandson and great-grandson in the male line. See *ante*, pp. 14, 17, 18, 19, 33 and 47 and Precedents pp. 58, 112, 219, 477, 478 and 495.

† See Precedents, pp, 6, 15, 16, 44—59, 101 and 105.

‡ *Mit.* In. Chap. I, Sect. v, § 3;—*Smri. Chan.* Chap. VIII, Cl. 18 ;—*Vyav. Mayú.* Chap. IV, Sect. i, § 3 ;—*Vir. Mi. Sans.* pp. 567—568.

(*b*) 'Land'] A rice-field or other ground.—*Mit.* Chap. I, Sect. v, § 4.

(*a*, *c*) Here the term 'father' includes also the paternal grand-father, and paternal great-grandfather, and the term 'son' indicates also a grandson and the great-grandson whose father and grand-father are dead.*

This does not mean, that the reason of the acquisition of ownership is found in the grandfather's death, and not in the production of a son: for (if it did), such ownership would be wanting in case no grandson were to be born to him up to the time of his death. In this way, therefore, either the word *grandfather* is of no use (in the argument); or it follows *a fortiori* (*prasakteh*) that there is no equal ownership in (property) acquired by the great-grandfather, and other (more remote ancestors). And the argument of 'cause and effect' might here be repeated.—*Vyav. Mayú.* Chap. IV, Sect. i, § 3.

Annotations.

divide it as directed by law; that is, give them and himself equal shares: nor is it in his power to alienate any considerable portion of it without their concurrence. It is according to the doctrine of this school, like dignities with us, inherent in the blood; and, therefore, so far as regards the interest of parceners, unalienable.—Stra. H. L. Vol. I, (1st Ed.) page 15.

29. The inchoate right that has been alluded to renders the sons, as has been seen, in some sort, co-proprietors with the father of the family property, to the extent of giving them, under particular circumstances, claims upon it in his life, which, consistently with the spirit and intention of the law, it is not in his power altogether to bar. Vesting in them, however, by birth,—they attach more upon *that* part of it that has been inherited by him, than upon what he may have himself acquired; the title to property descended from ancestors being considered to be in him and them, so far the same.—*Stra.* H. L. Vol. I, (2nd Ed.) p. 177.

* See *ante*, pp. 14, 17, 18, 19, 47, and Precedents, pp. 58, 112, 219, 477, 478, and 495.

(*d*) 'A corrody'] So many leaves receivable, from a plantation, of betle pepper, or so many nuts from an orchard of areca.—*Mit.* In. Chap. I, Sect. v, § 4.

What is fixed is corrody (*ni-bandha*),—constant income out of a mine and so forth.—*Ratnákara.*

A corrody (*ni-bandha*) signifies a permanent allowance received from saleable articles in virtue of an agreement or promise.* *Smri. Chan.* Chap. VIII, § 18.

(*e*) 'Chattels'] Gold, silver or other movables.—*Mit.* In. Chap. I, Sect. v, § 5.

In such property, which was acquired by the paternal grandfather, through acceptance of gifts, or by conquest, or other means, (as commerce, agriculture, or service,) the ownership of father and son is notorious. For, or because, the right is *equal*, or *alike.*—*Ibid,* § 5.

Authority. KÁTYÁYANA:—Paternal grandfather's property(*f*) vests *equally* both in the son and father.—*Smri. Chan.* Chap. VIII, Cl. 17.

Authority. VISHNU:—In the case of paternal grandfather's property (*f*), the ownership of the father and the son is *equal.*—*Smri. Chan.* Chap. VIII, Cl. 20.

Vyavasthá. **29.** (*f*) By "paternal grandfather's property, or ancestral estate (*poitámaha dhana*)" is understood not only the property, movable and immovable, acquired by, or descended from, the paternal grandfather or great-grandfather,† but also the accumulations of the income thereof, and also the ancestral property recovered with the aid of such accumulations, as well as any other property acquired therewith,‡ the son, grandson and great-grandson in the male line having in all these a right by birth, and equal ownership with the father and the rest.†

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* A corrody signifies what is fixed by a promise in this form: "I will give that in every (month of) *Kártiki.*"—*Dá. bhá.* Chap. II, § 13.

A corrody] Any thing which has been promised, deliverable annually or monthly, or at any other fixed periods.—*Srí Krishna Tarkálankára's* commentary on the *Dáya-bhága.*

† See *ante*, pp. 14, 15, 18, 19, also Precedents, pp. 112, 217—219, and also descriptions of Ancestral and Acquired property in the Book on Partition.

‡ See Precedents, pp. 18, 112, 134, 135, 217—219, 477 & 478.

The ownership of a father and a son being the *same* or *equal* in the paternal grandfather's or ancestral property, real as well as personal, and such property vesting equally in both the son and the father, as ordained by VISHNU, YÁJNAVALKYA, KÁTYÁYANA, and others,* it has been determined that—

30. A father cannot of his sole authority or independent act alienate joint ancestral property.† *Vyavasthá.*

The grandfather's own acquisition also *should not be given away* while a son or grandson is living.—*Mit.* In. Chap. I, Sect. i, § 24. **Authority.**

"The ownership of the father and the son is the same in land which was acquired by the grandfather, or in a corrody, or in chattels (which belonged to him.)" "Ownership is the same" herein the father has neither a larger share, nor can he *give it away at will.*‡—The *Ratnákara.* **Authority.**

31. A father cannot also alienate his own acquired immovable property and bipeds without the consent of all his sons.§ *Vyavasthá.*

Annotations.

30, 31. On immovable property, such as land or corrodies, children may be long subsisted. As it causes unlimited production of wealth, it is called an estate, or funds, for support: the loss of it is pronounced dishonorable in a text of NÁRADA (xii); and the gift of it, without the assent of sons and others using the estate, is called 'loss' in this text: Now a slave is such; for by agriculture or the like, he is able to gain much wealth for his master.—Coleb. Dig. Vol. II, (Lon. Ed.) page 141.

30, 31. The disposal of the land, *whencesoever* derived, must in general be subject to their (the sons') control; thus, in effect, leaving him (the father) unqualified dominion only over *personalty acquired.*—*Stra,* H. L. Vol. I, (2nd. Ed.) p. 20.

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* See *ante* pp. 32—34.

† See Precedents, pp. 6, 44—56, 105, 110, 116—118.

‡ *Vide* Coleb. Dig. Vol. III, (Lond. Ed.) p. 35, and Precedents p. 47.

§ *Vide* Precedents pp. 93, 116, 121, 122, 123.

Authority. But he (the father) is subject to the control of his sons and the rest, in regard to the immovable estate, whether *acquired* by himself or inherited from his father or other predecessor. Since it is ordained, "Immovables and bipeds (*g*), though acquired by the man himself, (there is) no gift or sale (*h*) of them, without convening all the sons."* "They who are born, they who are yet unbegotten, and they who are actually in the womb, require the means of support, (there is) no gift or sale of them.†—***Mit.*** In. Chap. I, Sect. i, § 27.

Authority. This text: "Though immovables and bipeds (*g*) have been acquired by the man himself, there is no gift or sale (*h*) of them without convening *all* the sons," is only *a prohibition against their gift, sale or the like,* not against the *use* of them.—*Vyav. Mayú.* Chap. IV, Sect. i, § 5.

(*g*) 'Bipeds'] Slaves employed in cultivation.—Coleb. Dig. Vol. II, (Lon. Ed.) pp. 113 & 114.

(*g, d*) Bipeds and corrody, though movables, are considered as real property in consequence of their alienation being governed by the rule which governs the disposition of immovable property.—*Vide* Coleb. Dig. (Lon. Ed.) Vol. II, p. 141 and Vol. III, page 434.

Remark.—The last portion of both the above texts of Yájnavalkya and Vyása, which is rendered by Messrs. Colebrooke and Borradaile by "a gift or sale of them *should* not be made" is

Annotations.

30, 31. But that even a sole owner, in respect of land, whether hereditary or *acquired,* having a family, cannot, by any act, without their concurrence, deprive his sons of their legal shares, nor the rest of a sufficiency for their maintenance. And that, where there is no land, they must all be provided for, to that extent, out of his personalty.—Stra. H. L. Vol. I, (2nd Ed.) p. 261.

* This text of Yájnavalkya is founded on the consideration, that immovable property is called the source of maintenance; consequently, the loss of the estate or means of subsistence when it is alienated with the consent of those who partake thereof, shall not be impugned as a fault.—Coleb. Dig. Vol. II, (Lon. Ed.) p. 113, and Vol. III, page 434.

† Vyása cited in other compilations.

"*na dánam, na cha vikrayah*" the verbatim translaton of which is "no gift and no sale": So from the plain wording of it, the above Sanskrit phrase means a positive ordinance not to make a gift or sale of such property, and not a moral duty as indicated by the learned Translators by prefixing the word "should" to the verb left to implication; I have, therefore, considered it proper to render the phrase literally; and to supply the implied verb which is in Sanskrit, "*is*," and not "should be made."

It is declared in the work called '*Prakásha*,' that "immovable and biped property, even if these be *self-acquired*, cannot be sold or given away without the consent of the sons.—*Vi. Chi.* p. 309. Authority.

Although a son and grandson have, by birth alone, ownership in the grandfather's property, yet, under the texts cited, since sons are dependent on their father in regard to the paternal estate, and the father has a predominant interest as it was acquired by himself, the sons must acquiesce in the father's disposal of his own acquired property *other than immovables and bipeds* (the disposal whereof is) restricted by the text "immovables and bipeds" &c., already cited (p. 36), but in regard to the grandfather's estate, there is power (vested in the grand son) of interdiction to prevent (illegal) alienation.—*Vi. Mi.* (*Sans.*) p. 177. Authority.

32. The expression "*though* acquired by the man *himself*, there is no gift or sale of them without convening all the sons,"* implies that *à fortiori* no alienation of ancestral property is to be made by a father without the consent of his sons, and that for the alienation of such property the consent of sons is necessary.† *Vyavasthá.*

Annotations.

32. Thus in Bengal, a man may make an unequal distribution among his sons of his personally acquired property, or of the ancestral movable property; because, though it has been enjoined to a father not to distinguish one son at a partition made in his life-time,

* Contained in the foregoing text of Yájnavalkya, p. 36.

† See Precedents pp. 44, 49—56, 86, 94, 116—118, 178.

And from the expression "there is no gift nor sale *without* convening all the sons" (p. 36), it is implied that—

Vyavasthá. **33.** A father can with the consent of his sons alienate property inherited from his father or paternal grandfather as well as the real property acquired by himself, and not otherwise.*

Authority. Thus MITRA MISRA:—"Though acquired by the man himself" (p. 36) by the use of this expression it has been shown that *á fortiori* consent of sons is necessary for (the alienation of) the paternal grandfather's property.—*Vi. Mi.* (*Sans.*) page 181.

Authority. VÁCHASPATI MISRA:—The assent of the co-heirs is required in the (alienation of) joint ancestral property whether movable or immovable.—*Vi. Chi. Sans.* p. 38.

Authority. MITRA MISRA:—Let a father certainly with the consent of his sons make a gift or other disposition of the immovable property acquired by him or descended from the paternal grandfather, under authority of the text already cited: *(viz.,)* "Immovables, bipeds," &c., (p. 36.)—*Vi. Mi. Sans.* page 182.

Authority. VÁCHASPATI MISRA:—But what is joint with others may be given with their consent.—*Vi. Chi. Sans.* p. 37.

Annotations.

nor on any account to exclude one from participation without sufficient cause; yet, as it has been declared in another place that the father is master of all movable property, and of his own acquisitions, the maxim that 'a fact cannot be altered by a hundred texts' here (*i. e.* in Bengal) applies to legalize a disregard of the injunction, there being texts declaratory of unlimited discretion, of equal authority with those which condemn the practice. In other parts of India, where the maxim in question does not obtain, the injunction applies in its *full force*, and any prohibited alienation would be considered *illegal*.—Macn. H. L. Vol. I, pp. 14 & 15. (See the Annotations under *Vyavasthá* 43.)

* See Precedents pp. 44, 49—56, 86, 93, 94, 116—118, 173.

Further, from the use of the word *all* in the same text of YÁJNAVALKYA (p. 36), it must be understood that—

34. A father is incompetent to alienate ancestral pro- property and his self-acquired real property without the consent of *any* (and not *all*) of his sons.* *Vyavasthá.*

As otherwise, the word *all* would be meaningless or nugatory, which it cannot be by reason of *all* the sons having by birth a right in such property and a power of prohibiting any illegal alienation thereof by their father or grandfather, as will be subsequently seen.† Reason.

PRAJÁPATI:—Whatever act is done in respect of immovable property, without the consent of the co-heirs, every such act is to be considered as *not done,* even where *one* of the co-heirs does not consent to it.—*Smri. Chan.* Chap. VII, Clause 45. Authority.

Consequently,—

36. For the validity or completion of an alienation by a father of such property as the above, it is necessary that the same be consented to(*i*) by *all* of the qualified or capable(*j*) sons, and subsequently ratified by the then minors after their attaining majority as well as by the other co-heirs or co-parceners whose consent could not be had at the time.‡ *Vyavasthá.*

(*i*) Non-prohibition or silence is also consent on account of the maxim: "The intention of another, not prohibited, is sanctioned."—*Da. Cha.* Sect. i, § 31. See Precedents pp. 190—192.

(*j*) From the term "qualified or capable" it is implied that the consent of those who are disqualified or incapacitated for any of the defects causing disherison, or from nonage, is not required to render such alienation valid or complete, though it is requisite that the then minor should ratify it after coming of age.§

* See Precedents, pp. 53, 136, 138, 173.

† *Vide Vyavasthá* 45 and the authorities &c. relative thereto.

‡ See Precedents, pp. 44—56, 103, 136, 123, 138, 173, 190 &c.

§ See the Chapter on Minority and that on Exclusion from Inheritance.

Vyavasthá. 37. (*h*) The term "sale*" must be taken to comprehend also hypothecation or mortgage, the same partaking the nature of a sale, and, in consequence, having been included in the exceptions of sale.†

EXCEPTIONS:—

Vyavasthá. **38. A father, without the consent of his son and the rest, is, however, competent to dispose of effects *other than real property* for indispensable acts of duty (*l*), and for purposes warranted by texts of law—as gifts through affection, support of the family, relief from distress, and so forth.‡**

Authority. It is a settled point, that property in the paternal and ancestral estate§ is by birth, still‖ the father has independent power in the disposal of effects *other than immovables (k)*,

Annotations.

38. And, even of movables that have *descended*, such as precious stones, pearls, clothes, ornaments, or other like effects, any alienation, to the prejudice of heirs, should be, if not for their immediate benefit, at least of a consistent nature. They are allowed to belong to the father, but it is under the special provisions of the law. They are his; and he has independent power over them, if

* At page 36.

† *Vide*—pp. 41, 42, and Precedents pp. 61, 62, 79, &c.

‡ *Vide* Annotations under *Vyavasthás* 45 and 58, and Precedents p. 93.

§ Here by the term "ancestral estate" must be understood property descended from the paternal grandfather, or his father, for, wherever a son has right by birth in his father's *ancestral* property, *there* the Sanskrit term used for it is "*poitámaha dhana*," (which literally means 'property appertaining to the paternal grandfather,) the expression "ancestral" by which the word '*poitámaha*' is rendered, must, therefore, mean 'ancestral *ex-parte paterná* and not 'ancestral *ex-parte materná*,' in which a son has no right by birth. (See *Vyavasthá* No. 29.

‖ It does not appear why Mr. Colebrooke has omitted to translate the word "*tathápi*" (*still* or *yet*); which is in the original just before the word "father," and has inserted within parenthesis the word "although," and put the verb (have) in the subjunctive mood, as by his so doing the meaning of the text seems to be somewhat altered. In order, therefore, to give the signification which the text naturally bears, I have inserted the translation of the word "*tathápi*" as it is in the original, and rejected the word "although."

for indispensable acts of duty (*l*) and for purposes prescribed by texts of law, as gifts through affection, support of the family, relief from distress, and so forth.—*Mit.* In. Chap. I. Sect. i, § 27.

(*k*) Here also by the term "other than immovables" or "movable estate," must be understood effects other than bipeds and corrodies, as well as land, the two former being treated in law as real or immovable property.*

(*l*) 'Indispensable duties'] Payment of just debts, revenue, the giving of a daughter in marriage, and so forth.

But he (the father) is subject to the control of his son and the rest, in regard to the immovable estate whether acquired by the man himself or inherited from his father or other predecessor. (*Mit.* In. Chap. I, Sect. i, § 27.) Nevertheless,—

39. A father or grandfather even without the consent of his son and the rest is competent to conclude a gift, or other disposition of real property, if any calamity affecting the family require it, or support of the family render it necessary, also for payment of revenue, and *just* debts or the like, for the performance of obsequies of the father or the like(*m*), for the marriage of a daughter or the like, and for other indispensable duties, religious or secular.† *Vyavasthá.*

Annotations.

such it can be called, seeing that he can dispose of them *only for imperious acts of duty, and purposes warranted by texts of law;* while the disposal of the land, *whencesoever derived,* must be in general subject to their control; thus, in effect, leaving him unqualified dominion only over personalty acquired.—*Stra.* H. L. Vol. I, (2nd Ed.) p. 20.

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* See *ante,* p. 36, *et post,* p. 43.

† See the Chapter on debts, and Precedents pp. 6, 54, 56, 61, 62, 63, 72, 94, 105, 118, 122, 136—138, 176, 181—186, &c.

Authority. VRIHASPATI:—Even a single individual may conclude a donation, mortgage or sale of immovable property during a season of distress, for the sake of the family, and especially for pious purposes.—Cited in the *Ratnákara, Vivádachintámani,* Mitákshará,*† &c.

Authority. The meaning of that text is this: while the sons and grandsons are minors, and incapable of giving their consent to a gift and the like; or while brothers are so‡ and continue unseparated; even one person, who is capable, may conclude a gift, hypothecation, or sale, of immovable property, if a calamity affecting the whole family require it, or the support of the family render it necessary, or indispensable duties, such as the obsequies of the father or the like (*m*) make it unavoidable.—*Mit.* In. Chap. I. Sec. i, § 29.

(*m*) Here by the term "or the like" is to be understood obsequies of a mother and the rest, and other indispensable duties religious or secular.§

Annotations.

39, 40. The concurrence of sons in the alienation by the father of land, however derived, as required by the Mitákshará, is dispensed with, where they happen to be all minors at the time, and the transaction has reference to some distress, under which the family labours, or some pious work to be performed, which the other members of it, equally with the father, are concerned in, should not

* *Viváda-chintámani*, page 309.

† The author of the *Mitákshará* cites the above text without mentioning whose it is: the learned Translator, however, says "it is VRIHASPATI'S, cited in the *Ratnákara.*" See *Mit.* In. Chap. I, Sect. i, § 28. Note.

‡ This much not being in the text of which the above is said to be the meaning, has not been given in the *Vír-mitrodoya, Viváda-chintámani* and other works of high authority in their interpretation of the above text. The Courts of justice too seldom restricted their judgments to the circumstance of a co-parcener being a minor or otherwise incapable of giving consent to an alienation, but have, except in one or two cases, made *legal necessity* the criterion for the validity of alienation of joint and undivided property by any of the co-sharers thereof.

§ See Precedents pp. 61, 62, 63, 72, 102, 105, 122.

But in a calamity affecting the family, any person (of the family) even without the permission of another is competent to make a gift, sale, or the like, even of immovable property, the support of the family being indispensable.—*Vír-mitrodaya (Sans.)* p. 181. Authority.

When any common danger happens, or when a daughter of the family is to be married, and the like, even the divided immovable property can be given or sold, by a person who has become separated.—*Vi. Chi.* p. 309. Authority.

"For the performance of religious duties," common to the heirs: alienation for these purposes is not forbidden. Immovable property, a corrody (out of mines or the like), and slaves (employed in husbandry) are subject to the same rules.—Coleb. Dig. (Lond. Ed.) Vol. III, p. 434.

40. Although under the circumstances or necessities, or for the purposes, mentioned,* a father or the head of a family, without the consent of his unseparated sons and the rest, is competent to alienate movable and immovable property descended from his father or other paternal ancestor, as well as the real property acquired by himself, yet so much only of such property can be alienated by him, without their consent, as is necessary to meet the exigency, or is sufficient for the purpose. Should he alienate more, the alienation of the portion in excess is invalid.† *Vyavasthá.*

Annotations.

be delayed. Such are the consecration of sacrificial fires, funeral repasts, rites on the birth of children, and other prescribed ceremonies, not to be performed without an expense, in which the Hindus are but too apt to indulge, on such occasions, to excess. Urged by any such consideration, and the sons at the time incompetent to judge, their concurrence may be assumed; and the father will be justified in acting without it, to the *extent* that the case may require.—*Stra.* H. L. Vol. I, (2nd Ed.) p. 20.

* That is, those stated in *Vyavasthás* 38, 39 and the authorities &c. relative thereto.

† See Precedents, pp. 81—83 and 183.

It has, however, been determined that, for the performance of such religious acts as are not positive, but optional he can alienate only a small portion.—*Vide* Precedents, page. 59.

Vyavasthá. **41.** Gifts of movable property, through affection being allowed to be made,* it must be concluded that a father is incompetent to make such gift of real property without the consent of those descendants who have by birth a right and ownership therein.†

Authority. By favor of the father, clothes and ornaments are used, but immovable property may not be consumed even with the father's indulgence.—*Mit.* In. Chap. I, Sect. i, § 21.

Authority. But the text of VISHNU which mentions a gift of immovables bestowed through affection, must be interpreted as relating to property acquired by the father himself and given with the consent of his son and the rest; for, by the passages (above cited,) as well as others not quoted, (*viz.*,) "The father is the master of the gems, pearls, &c.," the fitness of any other but immovables for an affectionate gift is certain.—*Mit.* In. Chap. I, Sect. i, § 25. Further,—

Annotations.

39. Should the maiden arrive at puberty unmarried, through poverty, her father and the rest would fall to a region of punishment, as declared by holy writ. Thus VASHISHTHA says, "So many seasons of menstruation as overtake a maiden feeling the passion of love and sought in marriage by persons of suitable rank, even so many are the beings destroyed by both her father and mother." This is a maxim of the law.—Coleb. *Lá. bhá.* Chap. XI, Sect. ii, § 6.

41, 42. As to *movables*, he (that is, a member of an undivided family) appears to be at liberty to make gifts on motives of natural affection, but *not* even with regard to these, to the extent of the whole of his property.—*Stra.* H. L. Vol. I (2nd Ed.) page 261.

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* See *ante*, pp. 10 & 41.

† See the Annotations under *Vyavasthás* 45 and 58; see also Partition, and Precedents, pp. 44—56, 93, 94, 117 and 144.

42. Although a proprietor without the consent of his son and the rest is competent to make a gift, through affection, of the movable ancestral property, still where there is only movable, and no real, property, *there* even such a gift could be made only of such portion thereof as would not affect the maintenance of his family, and leave the other members unprovided for.* *Vyavasthá.*

Because, *there* the movable property is to be considered in the place of immovable or real estate, there being no other means for the subsistence of the family, and the reason for which restriction is put on the alienation of real property is, in this instance, equally applicable to movable property. **Reason.**

VRIHASPATI:—A decision must not be given solely by having recourse to the letter of the law, for if no decision were made according to reason, there would be a failure of justice.—*Vyav. Mayú. (Sans.,)* p. 7. *Vide* Coleb. Dig. Vol. II, (Lond. Ed.) p. 128; Macn. H. L., Vol. II, p. 102.) **Authority.**

43. The restrictions imposed on, and the rules laid down for, a father with respect to alienation of ancestral property and his self-acquired real property, apply also to the paternal grandfather and *Vyavasthá.*

Annotations.

42. The restriction, as it respects the maintenance of a man's family, is against the alienation of the *whole* of his estate, (meaning land), not of a small part, no way affecting its support; and, if there be no land, nor property of that description, the reason applying, it extends to jewels, or similar valuables.—*Stra.* H. L. Vol. I, (2nd Ed.) page 180.

But that even a sole owner, in respect of land, whether hereditary or acquired, having a family, cannot, by any act, without their concurrence, deprive his sons of their legal shares, nor the rest of a sufficiency for their maintenance. And that, where there is no land they must all be provided for to that extent, out of his personalty.—*Stra.* H. L. Vol. 1, (2nd Ed.) page 261.

* See *ante* pp. 40—44, annotations under *Vyavasthás* 31, 45 and 58, and Precedents pp. 123, 166, 192, 193.

great-grandfather, their grandson and also the great-grandson (whose father and grandfather are dead) having, by birth, a right and ownership in such property, and the former, in consequence, having no power to alienate any portion of such property without the consent of the latter, except under a legal necessity or for purposes warranted by law.*

It follows then, that—

Vyavasthá. **44.** Alienation by a father, paternal grandfather or great-grandfather (as the case may be) of the ancestral estate or of his self-acquired real estate without the consent of *all* his sons, grandsons and the great-grandsons, who by birth have right and ownership therein jointly with him,* is void or invalid, unless such alienation was for a purpose warranted by the *Shástra*, or under a legal necessity.†

Authority. Prajápati:—"Any act done in respect of immovable property, without the consent of the co-heirs, is to be considered as *not done*, even where *one* of the co-heirs does not consent to it."—*Smri. Chan.*, Chap. VII, § 45.

Annotations.

43, 44. In ancestral real property, the right is always limited, and the sons, grandsons, and great-grandsons of the occupant, supposing them to be free from those defects, mental or corporeal, which are held to defeat the right of inheritance, are declared to possess an interest in such property equal to that of the occupant himself; so much so, that he is not at liberty to alienate it, except under special and urgent circumstances, or to assign a larger share of it to one of his descendants than to another—Macn. H. L. Vol. I, pp. 2 & 3.

* See *ante*, pp. 12—19, 33, 34, 40—43, and Precedents pp. 58, 112, 219, 222, 223, 477 and 495.

† See *ante*, pp. 40—43, and Precedents pp. 44—56, 63, 83—86, 93, 94, 105, 116—118, 121—124, 133.

45. Should a man, without the consent of his unseparated son, grandson, or the great-grandson whose father and grandfather are dead, alienate any ancestral real property without a legal necessity, or for a purpose not warranted by the *Shàstra, then such descendant has a right to prohibit, and power to restrain, the ancestor from making such alienation.†** *Vyavasthá.*

So likewise, the grandson has a right of prohibition, if his unseparated father is making a donation, or a sale of effects inherited from the grandfather: but he has no right of interference if the effects were acquired by the father. On the contrary, he should acquiesce, because he is dependant.—*Mit.* In. Chap. I, Sect. v, § 9. Authority.

Consequently, the difference is this: although he have a right by birth in his father's and in his grandfather's property; still, since he is dependant on his father in regard to the paternal estate, and since the father has a predominant interest as it was acquired by himself, the son should acquiesce in the father's disposal of his own acquired property; but since both have indiscriminately a right in the grandfather's estate, the son has a power of interdiction (if the father be dissipating the property.)—*Ibid.* § 10. Authority.

Annotations.

44. Any prohibited alienation would be considered *illegal.*—Macn. H. L. Vol. I, page 15.

44. The *Smriti-chandrika* declares, that restitution of a *prohibited* gift, as well as of a *void* one, shall be enforced by the Sovereign Authority, the property not having been transferred, nor a new right vested—*Stra.* H. L. Vol. I, (2nd Ed.) p. 262.

41, 42, 45. In provinces, in which the authority of the Mitákshará prevails, a Hindú is *restrained* from giving away immovables, and from making any other partition of his possessions among his

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* See *ante*, pp. 41—43. † See Precedents pp. 6, 101, 110—113,

Authority. "Although a son and grandson have by birth alone ownership in the grandfather's property, yet, under the texts already cited, since sons are dependant on their father in regard to the paternal estate, and the father has a predominant interest as it was acquired by himself, the sons should acquiesce in the father's disposal of his own acquired property *other than immovables and bipeds* (the disposal whereof is restricted) by the text "Immovables and bipeds &c.," already cited; but in regard to the grandfather's estate, there is power (vested in the grandson) of interdiction to prevent (illegal) alienations."—*Vi. Mit.* (*Sans.*) page 177.

It would seem from the above construction that in the case of the father's property, the ownership of the father and son is unequal (equality of ownership having been especially ordained in the case of the grandfather's property alone.) But this gives rise to the question, how could such an inequality exist while one possesses a right by birth in both his grandfather's and father's property? The reply, however, is that, in the case of the grandfather's property, the ownership (*Swámyam*) and also independent power (*Swátantryam*) are both equal in the father and son. Whereas, in the case of the father's (own acquired) property, while he is alive and free from defect, he (the father) alone possesses independent power (*Swátantryam*) and not the son. Hence alone arose the stated difference.—*Smri. Chan.* Chap. VIII, Cl. 21.

Vyavasthá. **46.** An unseparated son, grandson, or the great-grandson whose father and grandfather are dead,

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Annotations.

male descendants, than such as the law has sanctioned. Consequently, he would be *withheld*, from distributing immovables in a mode unauthorised by the law, but may bestow movables, of which the law permits him to make gifts on motives of natural affection: not, however, to the extent of the whole property.—Colebrooke's opinion. See *Stra.* H. L. Vol. II, (2nd Ed.) p. 427.

46. If any additional proof be wanting of the father's incompetency to dispose of ancestral real property by an unequal partition,

has a right to sue to set aside any illegal alienation of the hereditary real property by his ancestor and to recover the same.*

"The ownership of father and son is the same in land or the like† which was acquired by his father, &c." (*Ante*, p. 33.) From this text it appears that in the case of land acquired by the grandfather, the ownership of father and son is equal, and, therefore, if the father make away with the immovable property acquired by the grandfather, and if the son have recourse to a court of justice, a judicial proceeding will be entertained between the father and the son.—*Mit.* (*Sans.*) p. 57. See Macn. H. L. Vol. I, p. 227. **Authority.**

Annotations.

or to do any other act with respect to it which might be prejudicial to the interests of his son, I would merely refer to the provision contained in Chap. iii, Sect. 7, § 10 of the translation of the extract from the Mitákshará relative to judicial proceedings. The rule is in the following terms :—"The ownership of father and son is the same in land which was acquired by his father," &c. From this text it appears, that in the case of land acquired by the grandfather, the ownership of father and son is equal ; and, therefore, if the father make away with the immovable property so acquired by the grandfather, and if the son has recourse to a court of justice, a judicial proceeding will be entertained between the father and son." The passage occurs in a dissertation, as to who are fit parties in judicial proceedings ; and although the indecorum of a contest wherein the father and son are litigant parties has been expressly recognized,

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* See Precedents, pp. 6, 102, 104, 105.

According to the decisions of the Madras High Court, a son can set aside the (illegal) alienation made by his father, and recover the property to the extent of his own share, and not to that of the vendor's or any other co-parcener's share also.—See Precedents, pp. 139—145.

† In the printed copies of the *Mitákshará* (in *Sanskrit*) the word '*bhúmi*' (land) is followed by '*ádi*' (the rest, or the like,) which has not been rendered in the translation made by Sir W. Macnaghten (see his work on Hindú law, Vol. I, p. 227.) Here by the word '*ádi*,' however, is meant corrodies and bipeds, the alienation thereof being governed by the rule respecting land. (See *ante*, pp. 41 & 48). So even if the word '*ádi*' had not been in the original, the term land would have supplied the deficiency, the same comprehending also what is here meant by '*ádi*.'

Remarks.

It has been shown that according to the Mitáksharâ and other unquestionable authorities, a father, without the consent of his son and the rest, is incompetent to alienate even his own acquired real property except under a legal necessity, or for purposes warranted by law.* Nevertheless, it having been said in a subsequent passage of the Mitákshará that "he (the son) has no right of interference, if the effects were acquired by the father: on the contrary, he should acquiesce, because he is dependant,"† it has, of late, been concluded and determined by the British dispensers of justice that—'a father is competent, without the consent of his son and the rest, and without even a legal necessity, to alienate his own acquired property, real as well as personal.‡

Annotations.

yet, at the same time, the rights of the son are declared to be of so inviolable a nature, that an action by him for the maintenance of them will be against his father, and that it is better there should be a breach of moral decorum than a violation of legal right.—Macn. H. L. Vol. I, p. 46.

* See *ante*, pages 40—42.

† The entire passage of which the above is the latter part, is given in page 47, *q. v.*

‡ Sir William Macnaghten, too, has laid down as a Principle that—'With respect to personal property of every description, whether ancestral or acquired, and with respect to real property acquired by the occupant, he is at liberty to make any alienation or distribution as he may think fit, subject only to spiritual responsibility' (1 Macn. p. 3); and as an authority for the above, he has, in a foot-note, referred to a text of VRIHASPATI and JAGANNATHA'S exposition (in 3 Dig. 45); but it will be found upon a perusal of the said text and exposition that the above principle is scarcely borne out by them. The above principle, moreover, does not seem to be correct according to the Mitákshará and the authorities of the Mithilá, Mahrátta and Drávida schools, except as to the movable property acquired by a father, or recovered by him without the aid of joint funds or without co-operation of sons and the rest, or with their privity, (as will be known from this and the following chapters, and also from the Book on Partition). The principle in question must, therefore, be understood to be according to the doctrine of the Bengal school, though not with respect to the property acquired or recovered with the aid of joint funds or with co-operation of sons and the rest (see the Dáya-bhága and the other books of this school). That the above principle is according to the Bengal school (with the exception of the aforesaid description of property) is evident from the fact of its containing the expression "subject to the spiritual responsibility;" since the doctrine of '*Factum Valet quod fieri non debuit,*' is prevalent in the Bengal school *alone*. This is affirmed by the learned author himself. See the Annotations in p. 38.

[illegible] of such property.* [illegible] the foregoing passages as well as by the above concluding passage of the Mitákshará [illegible] the alienation by a father of his own acquired immoveable property is clearly [illegible] by the subjoined passage of the [illegible] which [illegible] illustrates the meaning of the Mitákshará, and [illegible] authority in the Benares School.† "Although a son and grandson have by birth some ownership [illegible] grandfather's property, yet, under the texts already [illegible] sons are dependent on their father in regard to the paternal estate, and the father has a predominant interest as it was acquired by himself, the sons should acquiesce in the father's disposal of his own acquired property [illegible] whereas [illegible] already [illegible] in regard to the grandfather's estate, there is power [illegible] in the grandson of interdiction to prevent [illegible]" [illegible] p. 1[illegible].‡

Furthermore, if it had been the doctrine of the Mitákshará that a father without the consent of his son and the rest is competent to alienate his own acquired real estate for purposes other than those sanctioned by law or without a legal necessity, then he would not have laid down that 'a father may conclude a gift, hypothecation, or sale of immoveable property if a calamity affecting the whole family require it, or the support of the family render it necessary, or indispensable duties make it unavoidable,' thereby indicating that he cannot alienate such property for any other purpose or under any other circumstance without the consent of his son and the rest. §

But even if it be taken for granted that the Mitákshará, which is a commentary on the Institutes of the Legisla-

* The concluding passage above alluded to runs thus :—"Consequently, the difference is this : although he have a right by birth in his father's and in his grandfather's estate, still, since he is dependent on his father in regard to the paternal estate, and since the father has pre-dominant interest as it was acquired by himself, the son should acquiesce in the father's disposal of his own acquired property : but since both have indiscriminately a right in the grandfather's estate, the son has a power of interdiction (if the father be dissipating the property.)"—*Mit.* In. Chap. I. sect. v., § 10.

† See the Preface and Precedents, p. 522. ‡ See *ante*, p. 36.

§ See *ante*, page 42.

Remarks.—As respects the *movable* property acquired by, or descended from, a paternal grandfather, there is a difference of opinion :—

NÍL-KANTHA, the author of the *Vyavahára-mayúkha,* says, "As for this text :—'The father is master of all gems, pearls, corals, but neither the father, nor the grandfather is so of the whole immovable estate,'—it also means the father's independence only in the wearing and other (use) of ear-rings, rings, (&c.,) but not as far as gift or other alienations. Neither is it with a view to the cessation of the cause of his ownership on the production of a son. This very meaning is made manifest also by [the text] noticing [only] gems, and such things as are not injured by use. Even so, this text :—'Though immovables and bipeds have been acquired by the man himself, a gift or sale of them should not be made without convening all the sons,'—is only a prohibition against their gift, sale, or the like, not against the use of them."—*Vyav. Mayú.* Chap. IV, Sect. i, § 5. So,—

According to the *Vyavahára-mayúkha,*—

Vyavasthá. 48. A father has independent power to use the movable property acquired by, or descended from, his father or paternal grandfather, but not to make a sale or other disposition thereof without the consent of his son, or without a legal necessity.

VIJNÁNESHWARA, the author of the Mitákshará, after citing the text—"The father is master of the gems, pearls, corals, and of all (other movable property), but neither the father, nor grandfather, is so of the whole immovable estate,"—first reconciles his own opinion with the other opinion by saying, "As, according to the other opinion, the precious stones, pearls, clothes, ornaments and other effects, though inherited from the grandfather, belong to the father under the special provisions of the law ; so, according to our opinion, the father has power, under the same text, to give away such effects, though acquired by his father. There is no difference."*

* *Mit.* In. Chap. I, Sect. i, § 21, 24.

property, however, can be given away only with their consent: such is the difference. Upon the grandfather's death, his ownership in the effects left by him ceasing to exist, they become the common property of the father and son, but although the right of the latter accrues to his (the grandfather's) property, yet his (the grandson's) consent is required *only* in the (alienation by the father of the) immovables, and not in the (disposal of) gems, pearls, and other movable property." (*Vi. Mit. Sans.*) pp. 160 and 161.) So,—

According to the *Vír-mitrodoya*,—

Vyavasthá. 49. A father without the consent of his son and the rest is competent to dispose of the ancestral *movable* property even for purposes other than those sanctioned by law, or without a legal necessity.

The above is one of the very few instances in which the author of the *Vír-mitrodoya* has differed from his master, VIJNÁNESHWARA. But since the *Vír-mitrodoya* is the latest Benares authority on the subject, and as the doctrine inculcated by it has received corroboration from the *Smriti-chandriká* and *Mádhavya*,* and has been adopted by the British writers on Hindú law, and also followed in the decisions of the British courts of judicature, the above must, therefore, be held to be the *Vyavasthá* or settled law on the point in question,† (in the Provinces not governed by the rules of the *Vyavahára-mayúkha.*)

It has been adjudged that—a son, fatherless grandson, or the great-grandson whose father and grandfather are dead, having a right to sue for setting aside any illegal alienation by his ancestor of the hereditary property, has also a right to sue for a declaration that the alienation is void altogether, and that the ancestor be restrained from making any illegal

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* See Precedents pp. 121, 192, & 193.

† Out of the principle laid down by Sir William Macnaghten as already cited (p. 51, note), the portion—"with respect to ancestral personal property, the occupant is at liberty to make any alienation he may think fit," being consonant to the above exposition of the *Vír-mitrodoya*, may be taken to be the Law on the above point.

alienation of such property. And suing on behalf of the family, he may be entitled to a decree for possession.* It has also been adjudged that—

50. The power to restrain a father or other ancestor from alienating ancestral property, and to sue to set aside the illegal alienation thereof, if any, can, however, be exercised by a son, grandson, or the great-grandson whose father and grandfather are dead, only where he did not consent to the transaction† or did not get the benefit of his share of the purchase-money, or where the purchase-money has not been applied to pay off a valid encumbrance on the estate.‡ *Vyavasthá.*

VRIHASPATI:—A decision must not be made solely by having recourse to the letter of the written code, since if no decision were made according to the reason (of the law), there might be a failure of justice.—*Vyav. Mayú.* p. 7. See Coleb. Dig. Vol. II, p. 128. Authority.

It having been laid down in the Mitákshará and other paramount authorities that a son, and a grandson (whence, also the great-grandson whose father and grand father are dead) can prevent their father, grandfather, and great-grandfather from illegally alienating property inherited from his ancestor *in the direct male line,* or can sue to set aside such alienation of such property, if made,§ it follows that—

51. A son, grandson and great-grandson have no right to prevent their father, grandfather or great-grandfather from alienating a property which is not an unobstructed heritage, but was inherited by him from a *collateral* or *maternal relative,* or was otherwise *acquired.*‖ *Vyavasthá.*

* See Precedents, pp. 6, 54, 104, 105, 160.

† See *ante,* pp. 36—38.

‡ See Precedents, pp. 83, 84, 101, 103—105, 181, 182.

§ See *ante,* pages 12, 13, 47—49.

‖ See *ante,* pp. 12, 13, and Precedents, pp. 110—113.

A son, grandson and the great-grandson whose father and grandfather are dead, being declared to possess exclusively the power to restrain their father and the rest from illegally alienating the hereditary property and to set aside such alienation by a law-suit,* it is concluded that—

Vyavasthá. 52. No heir other than a son, grandson or great-grandson (in the male line) has a right or power to restrain his predecessor from illegally alienating hereditary estate as well as self-acquired real property.†

Reason. Because, the right of such heir accrues not by birth, but only on the demise of the occupant,‡ so, having no right by birth, he has no right of interdiction or power to prevent alienations, even if the owner be dissipating the property. Hence,—

Vyavasthá. 53. A man having no son, grandson, or the great-grandson (whose father and grandfather are dead), but any other heir or no heir at all, can alienate, at will, the share or property which solely devolved on, or belonged to, him, if he has no family whom he is bound to support.§ (See *Vyavasthá* 54 and the authorities relative thereto.)

Annotations.

53. Property belonging to a single man, not shared by a coparcener, may be enjoyed and disposed of by him, as he pleases; remoter heirs not being, in this respect, objects of legal care. His entire alienation of it, without consulting any one, being "the act of a person who is his own master, is valid." Only even, with reference to one thus isolated, what he does not dispose of in his lifetime, must be left to descend in a course of inheritance: the right of aliening (with very little exception) being confined to acts to take effect in the life of the grantor.—*Stra.* H. L. Vol. I, (1st Ed.) page 17.

* See *ante*, pages 47—49. † See Precedents, pp. 107—110, 123, 124.
‡ See *ante*, pages 12—14, 19, 20, 27—29, and Precedents pp. 112—113.
§ See Precedents pp. 107—110, 123, 192, 193.

Inasmuch as, a relative other than a son, grandson, or the great-grandson whose father and grandfather are dead, has no claim to the alienor's property in his life-time,* and consequently no power to restrain him from making the alienation, and to sue to set aside the same, if made. Reason.

Remarks.—Some of the Hindú jurists upon the authority of the text—"They who are born, they who are yet unbegotten, and they who are actually in the womb, require the means of support, there is no gift or sale thereof,† (*ante* 36)"—maintain that a man cannot, without a legal necessity, alienate his real property, acquired or inherited, not only when he has a son, grandson, or great-grandson (whose father and grandfather are dead,) alive or conceived, but also when there is a probability of such child being begotten and born in future. It has, however, been determined by others and the Dispensers of justice that *that* text constitutes a precept which is not obligatory so far as it respects the issue yet unbegotten; consequently, not to alienate property in anticipation of the birth of an issue not yet conceived, is a duty not positive, but moral.† No man, therefore, can be restricted from alienating, at will, the property solely owned (*n*) by him, though there be a probability of male issue being begotten and born in future, since

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Annotations.

53, 54. The restriction, as it respects the maintenance of a man's family, is against the alienation of the whole of its estate, (meaning *land*,) not of a small part, no way affecting its support; and, if there be no land, nor property of that description, the reason applying it extends to jewels, or similar valuables.—*Stra.* H. L. Vol. I, (2nd Ed.) page 18.

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* See *ante*, pages 19, 20.

† If this text is to be construed literally, as far as it relates to the unbegotten son, its effect would be to prevent *any* alienation at any time. It is nothing more than a moral precept, evincing the kindly provision which the Hindú contemplates making for the general family.—Norton's Leading Cases, Part II, p. 423. *Vide* Keshob Chunder Ghose *v.* Bishnu Prosaud Ghose.—S. D. A. Decis. for 1860, p. 340.

such issue can have no right prior to his birth or conception,* and having no such right, he cannot set aside the alienation and recover the property alienated before his birth, as otherwise, the effect would precede its cause; for, birth alone is the cause of heritable right;* and this right would accrue before its cause, should such issue be allowed to have a right to recover the property disposed of before his birth. Nevertheless,—

Vyavasthá. **54.** If the sole owner of an estate, destitute of such male issue as above, has a family whom he is bound to maintain, he must not alienate the whole of his property though solely owned(*n*) by him, but only what may remain after reserving and preserving a portion adequate to its maintenance.†

(*n*) Here by '*property solely owned*' must be understood the portion of the ancestral or joint family property which the man received exclusively for his own share in partition with his coparceners (collateral, as well as lineal, if any), also the property which he solely inherited and enjoyed without a co-sharer (lineal or collateral), and also his self-acquired separate property.

Annotations.

53—55. It is to be recollected, however, that separate acquisitions, by a member of an undivided family, so made as to render them exclusive, and impartible, are as much sole property, to all intents and purposes, as though the maker had been, at the time, divided, and separate. And that, even with respect to *prohibited* gifts, 'they may be valid, under the exceptions which the law allows; such as distress, necessary support of the family, and pious uses, arising from indispensable duties.—*Stra.* H. L. Vol. I, (2nd Ed.) p. 261.

53, 54. The author of the Smriti Chandriká, speaking of common property, of which a gift is forbidden by the law, observes, that this regards common ways, and other things common to many; but property belonging to an undivided family (he says) may, in

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* See *ante*, p. 14—16, and Precedents 6, 15, 49, 72 and Mad. H. C. Decis. Vol. IV, page 307.

† See the Annotation in pages 37, 45, 59, and Precedents pages 123, 192, and 193.

Authority. III. MANU:—Even what he does for the sake of his future spiritual body, to the injury of those whom he is bound to maintain, shall bring him ultimate misery, both in this life and in the next.

Authority. IV. VRIHASPATI:—A man may give away what remains after the food and raiment for his family; the giver of more, *who leaves his family naked and unfed,* may taste honey first, but shall afterwards find it poison.—*Vide* Coleb. Dig. (Lon. Ed.) Vol. II, page 131.

Authority. V. KÁTYÁYANA:—Except his whole estate (*o*) and his dwelling house, what remains of his *own* property after the food and clothing of his family, a man may give away; otherwise it may not be given.*—*Vi. Mi.* (*Sans.*) p. 122. *Vide* Coleb. Dig. Vol. II, (Lon. Ed.) p. 133.

Authority. As to what is said by KÁTYÁYANA—"Except his whole estate and his dwelling house, what remains of his own property after the food and clothing of his family, a man may give away; otherwise it may not be given." By that is meant that excepting (his) dwelling house, the property which is *his own,* that is, the property capable of being alienated (by him) at pleasure.—*Vi. Mi.* (*Sans.*) p. 122.

(*o*) The whole estate should be understood in the mode already mentioned; that is, the whole of his effects, including what is required for the maintenance of the family until other property

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* The original of the above runs thus:—"*Sarvaswam griha barjan-tu kutumba-bharnádhikam, yad-dravyam tat swakam deyam, adeyam syát atonyathá;*" and the following is the translation hereof as contained in Colebrooke's Digest:—"Except his whole property and his dwelling house, what remains after the food and clothing of his family, a man may give away, *whether it be fix or movable;* otherwise, it may not be given." (Lond. Ed. Vol. II, p. 133) But this does not give the meaning of the *Sanskrit* words "*Yat dravyam tat swakam* (the property which is his own)," which form the essential part of the above text of KÁTYÁYANA; inasmuch as, what the Sage intended to ordain by that portion of the text is, that a man may give away *what is his own property,* after reserving as much of it as may suffice for the food and raiment of his family. The above error is also manifest from the interpretation of the text itself which is given by *Jagan-nátha* and translated by the same learned translator, and which is inserted here, below the text in question. *q. v.*

The above text of KÁTYÁYANA has been held to be a restrictive, and not a moral, precept. See the Section on Maintenance, and *Mongala Debi* v. *Dinanath Bose.* 4 B. L. p. 72.

(*p, q*) "Except a wife and son, a man may give away what is *his own*, if it does affect the (subsistence of his) family:" the meaning is that, without injury to the family he may give away *that* which may *exceed* the support of (his) family, and which is *his own.*—*Vi. Mit.* (*Sans.*) p. 121.

(*q*) 'If it does not affect the (subsistence of his) family,'—that is, he may give away what may exceed the support of (his) family; because, maintenance of the family is an indispensable obligation. Thus MANU:—"A mother and father in their old age, a virtuous wife, and an infant son, must be maintained, even by the commission of a hundred offences."—*Mit* (*Sans.*) page 259.

(*r*) Further, a son, son's son, and other descendant being *in esse*, he (the owner) should not give away the whole (of his) property; for it is said (by NÁRADA) that procreating sons, (the father) must perform their initiatory ceremonies, and provide for their livelihood.—*Mit.* (*Sans.*) p. 260.

Vyavasthá. **55.** After partition with his sons also a father can, without their consent, alienate the share received by him in partition, as well as the property subsequently acquired by him, to any person, if no son is born to him after partition, and he has no other family whom he is bound to maintain.*

Exposition. He can do so, because, the claim which the other sons had, upon strength of their right by birth, to the ancestral and paternal property, no longer existed by reason of their having already received their appropriate shares therein, and the father was no longer subject to their control in regard to the alienation of his own share; and because, partition destroying the joint right in the whole, and causing the father's several or exclusive right to his own share to accrue, rendered him the absolute master thereof and vested with independent power to alienate the same.

Partition (*vi-bhága*) is the adjustment of diverse rights regarding the whole by distributing them on particular portions of the aggregate.—*Mit.* In. Chap. I, Sect. i, § 4.

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* See Partition, and Precedents pp. 90, 92, 147, 179.

Authority. III. Although a son and grandson have, by birth alone, ownership in the grandfather's property, yet, under the texts already cited, since sons are dependant on their father in regard to the paternal estate, and the father has a predominant interest as it was acquired by himself, the sons must acquiesce in the father's disposal of his own acquired property* *other than immovables* and *bipeds* (the disposal whereof is restricted) by the text "Immovables and bipeds," &c., already cited (*ante* pp. 36, 37;) but in regard to the grandfather's estate, there is power (vested in the grandson) of interdiction to prevent (illegal) alienations.—*Ví. Mit.* *(Sans.)* page 177.

Vyavasthá. 57. Movable property lost by a paternal ancestor and recovered by a father without the aid of the joint funds or without co-operation, but with the permission or privity of his son and the rest, may also be disposed of by him at will, the same being treated by law as his self-acquired property.† Nevertheless,—

Vyavasthá. 58. Where there is only self-acquired movable property, *there* the father must not alienate the whole without reserving a portion adequate to the maintenance of the family whom he is bound to support.‡

Authority. Because maintenance of the family is an indispensable obligation.—*Ví. Mit. (Sans.)* p. 181. *Vide Mit.* (*Sans.*) page 260.

Annotations.

58. As to movables, he appears to be at liberty to make gifts on motives of natural affection, but not even in regard to these, to the extent of the whole of his property.—*Stra.* Vol. I, (2nd Ed.) page 261.

* The expression—"the son must acquiesce in the father's disposal of his own acquired property,"—seems to be used for the sake of facility in the transaction, and not on account of any want of sufficient power in the father: in the same manner as in the case of alienation by a separated parcener the consent of all the rest tends to the facility of the transaction, by obviating any future doubt, and not on account of any want of sufficient power.—See *Mit.* In. Chap. I, Sect. i, § 30.

† See Partition.

‡ See the annotations in pages 36 and 45, also *Vyavasthá* 54, and the authorities, annotations, &c., relative thereto.

It has been adjudged that—the right by birth, which a son has in the ancestral estate as well as his interest in the property separately acquired by him, can be sold for his own debts ;* and that—

59. Sale of ancestral property for liquidation of the father's debt is valid, provided the debt was contracted legally and not for an immoral purpose.† *Vyavasthá.*

SECTION II.

THE SUPREMACY OR CONTROL OF A FATHER OVER JOINT PROPERTY, &c., AND—IN CASE OF HIS ABSENCE, DISABILITY, DEMISE, OR ABDICATION,—OF HIS ELDEST SON OR ANOTHER BEST QUALIFIED.

60. Although the father and son have equal right and ownership in the ancestral estate, and the father has to obtain his son's consent to the disposal of such property, as well as to the disposal of other joint-family property, yet the father alone is entitled to hold and manage such property, to receive and disburse monies, and to manage all other family affairs, he being governor thereof.‡ *Vyavasthá.*

61. As in civil matters, so in religious duties also, sons are dependant upon their father, and are to act under his permission. *Vyavasthá.*

Annotations.

60. With regard to the *state* of the owner, the law in its provisions for disposal of property, almost constantly contemplates him as the head of the family. To one not so, restrictions upon alienation do not generally apply.—*Stra.* H. L. Vol. I, (1st Ed.) pp. 16, 17.

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* See Precedents, p. 114. † See Precedents, pp. 63, 72, 176.

‡ See *ante*, pp. 35—41, 55, 56, also Partition in the father's life-time, and Precedents pp. 6, 42, 71, 126, 128—130.

Authority. HÁRÍTA:—While the father lives, sons are not independent (*d*) in regard to the receipt (*a*), and expenditure(*b*) of wealth, and (*ákshepa*)* amercement (*c*).—*Smri. Chan.* Chap. I, Cl. 21;—*Vi. Mi.* (*Sans.*) page 170.

(*a*) 'Receipt'] Enjoyment (of wealth.)—*Smri. Chan.* Chap. I, Clause 21.

(*b*) 'Expenditure'] Disbursement of wealth.—*Ibid.*

(*c*) 'Amercement (*ákshepa*)']* Fining the slaves and other household servants, when they commit faults, by way of chastisement.—*Ibid.*

(*d*) 'Are not independent'] are not competent to enjoy the wealth at pleasure, irrespective of the will of the father.—*Ibid.*

Likewise, they are incompetent to perform separately religious sacrifices, and to dig tanks, &c., for charitable purposes.—*Vide Smri. Chan.* Chap. I, Cl. 22.

Authority. It must hence be understood that the son must maintain the consecrated fire (*agni-hotra*,) and perform other religious acts with the permission of his father, and not without it.—*Smri. Chan.* Chap. I, Cl. 22.

Authority. "After the death of the father and the mother, the brothers, being assembled, may divide among themselves the paternal (and maternal) estate; but they have no ownership over it, while their parents live (unless the father choose to distribute it.)" (MANU, Chap. IX, *v.* 104.) "They have no ownership over it while their parents live"] By this also their want of independent power over their property is indicated, and not want of right, for it is a settled point that sons have, by birth, a right in the paternal wealth.—*Vi. Mi.* (*Sans.*) page 170.

Authority. As to what DEVALA says:—"When the father is deceased let the sons divide the father's wealth, for, sons have not ownership (*swámyam*) while the father is alive and free

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* "*Akshepa*" is translated as "bailment" in Colebrooke's *Dáya-bhága* Ch. I, para. 42; as "recovery" in II Digest, page 199; and as "censure" in Borradaile's *Vyav. Mayú.* Chap. II, Sec. I, para. 4. But none of these translations agrees with this author, who construes the term in the sense of "amercement."—Note by the Translator of the *Smriti-chandriká*, page 5.

Authority. (e) "With his consent"] With the consent of the eldest son who then possesses independent power.—*Ibid.* Cl. 29.

(f) "Younger brother (*anantara*)"—signifies a younger brother in general; competency to transact business, and not seniority by birth, being here essential.—*Vide Ibid.*

Authority. HÁRÍTA:—But if he (the father) be decayed, remotely absent, or afflicted with disease, let the eldest son manage the affairs as he pleases [*kámam* (g)]."—*Smri. Chan.* Chap. I, Cl. 30.

(g) "As he pleases (*kámam*)"] In reference to the eldest son, in the above passage, the dependance of the sons on their father is shown to have then ceased.—*Ibid.*

It appears from the (above) text of HÁRÍTA, that if the father be living, but anyhow disqualified for business, the eldest son has a right to manage the affairs. MANU also declares, that the eldest son alone shall conduct the affairs like a father, although the title of all the brethren to that estate be equal.—Coleb. Dig. Vol. II, (Lon. Ed.) p. 528.

Authority. MANU:—The eldest brother may take entire possession of the patrimony; and the others may live under him, as *they lived under their father, unless they choose to be separated.*—Coleb. Dig. Vol. II, (Lon. Ed.) p. 528.

Exposition. That is, the eldest endued with all the most eminent virtues, shall have power, like a father, over the inheritable patrimony. *Ratnákara.*—See *Ibid.* And,—

Vyavasthá. **63.** If the father abdicate or give up his worldly concerns, then also, as upon his death, natural

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Annotations.

the occasion; not primogeniture, but capacity, being, for this purpose, considered as affording the best rule in a family; though, other things being equal, the elder has undoubtedly the preferable title.—*Stra.* H. L. Vol. I, (2nd Ed.) p. 183.

63. The inheritance having descended in co-parcenary, the characteristic of this state, while it continues, is, with reference to

or civil, the eldest son, or the son who is best qualified, will have, independently of him, power to deal with, and manage, the family estate, so long as it continues undivided, notwithstanding that all the other brothers are, in that case, vested with *full* right in the estate, their inchoate right arising by birth becoming then perfected by the voluntary abandonment of the occupant.*

Because, then the father, if he choose to remain at home, will only be revered as the head of the family in respect of the performance of ceremonies, but not in respect of the family-estate. **Reason.**

64. Except under the necessity or circumstances, above stated, should a son, without his father's consent, exercise his (the father's) power to enter into contracts and to do other acts in respect of the joint family property, the same are illegal and invalid.† *Vyavasthá.*

Annotations.

the property and management of it, a community of interest; though, in order to avoid confusion, reason and law alike suggest the propriety of adopting some one to conduct the family concerns. The eldest has a claim to this confidence, but it is subject to character, and the general sense of the co-parceners, without a concurrence of which no express or implied pretention of the kind can have any validity. This management regards the dealings and transactions that are carried on under it, professedly on behalf of the family, the obligatory force of which becomes of importance alike to the members in general, and to creditors.—*Stra.* H. L. Vol. I, (1st Ed.) p. 176.

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* See Partition, and *ante* pp. 20—24, and also Precedents pp. 25—27, 36 37, 131, 132.

† See Precedents pp. 126—130, and Partition in the life-time of the father.

SECTION III.

THE EXTENT OF THE RIGHT AND POWER OF A CO-PARCENER OVER PROPERTY, DIVIDED, OR UNDIVIDED.

Vyavasthá. **65. No member of a joint family, without the consent of his co-parcener, is competent to alienate the joint property even to the extent of his own share therein; such alienation of such property being both illegal and invalid.***

Reason. Because, partition not having taken place, he has no several right in any part of the estate, but a right united with that of his co-parcener in the whole property indiscriminately, so that the same property which appertains to one parcener belongs to another likewise.†

VYÁSA :—A single parcener may not without the consent of the rest, make a sale or gift of the whole immovable estate, nor of what is common to the family.‡—*Vi. Mi.* (*Sans.*) p. 181.

Annotations.

65. A co-parcener is prohibited from disposing of his own share of joint ancestral property ; and such an act, where the doctrine of the *Mitákshará* prevails, (which does not recognize any several right until after partition, or the principle of '*factum valet*,') would undoubtedly be both illegal and invalid.—Macn. H. L. Vol. I, p. 5.

65, 68.—The Mitakshará of VIJNYÁNESWARA makes no such distinction nor exception, though the author explains unfit gifts as comprising, 1st, such as are not fit to be given for want of proprietary right; and 2ndly, such as may not be given by reason of an

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* See Precedents pp. 6, 54—57, 133, 138, 147—161, 173, 182, 186, 188, and Macn. H. L. Vol. II, Chap. X, Case 3, and Chap. XI, Case 5.

† Partition (*Vi-bhága*) is the adjustment of diverse rights regarding the whole by distributing them on particular portions of the aggregate.—*Mit.* In. Chap. I, Sect. i, § 4.

Partition confers a special or exclusive ownership on the sons and the rest over the paternal estate and so forth.—*Smri. Chan.* Chap. I, Cl. 27.

‡ See Colebrooke's translation of the *Dáya-bhága*, page 31, note.

PRAJÁPATI:—Any act done in respect of immovable property without the consent of the co-heirs, is to be considered, as not done, even when one of the co-heirs does not consent *(a)* to it.—Vide *Smri. Chan.* Chap. VII, § 45. **Authority.**

(*a*) Consent may be express or implied, as well as presumed by silence or the like.*

If there be no prohibition, there is consent, on account of the maxim: "The intention of another, not prohibited, is sanctioned."—*Da. Chan.* Sect. i, § 32.

VRIHASPATI:—Separated kinsmen as those who are unseparated, are equal in respect of immovables: one has not power over the whole to make a gift, sale or mortgage. *Ratnákara*; *Vyav. Mayú.* Chap. IV, Sect. VII, § 37; *Smri. Chan.* Chap. XV, Cl. 3. **Authority.**

As for the text of VRIHASPATI: "Separated heirs as those who are unseparated, are equal in respect of immovables; for one has not power over the whole, to give, mortgage, or sell it;" according to *Madana* it is for putting a stop to the right, among coheirs, even separated as to their shares (of movable effects, though unseparated in other respects), to dispose by gift or other mode, without (general) consent, of grain, or the like, the produce of undivided fields or other (fixed property).—*Vyav. Mayú.* Chap. IV, Sect. VII, § 37.

Annotations.

express prohibition. The alienation of joint property is comprehended in this author's class of *gifts unfit*, because they are prohibited: and the only distinction that seems fairly deducible from his doctrine is, that gifts unfit by reason of the want of proprietary right, are necessarily null and void; but that gifts unfit, because they are prohibited by general rules, may be valid under the exceptions which the law allows: such as distress, necessary support of the family, and pious purposes arising from indispensable duties. (*Mit.* In. Ch. I, Sect. i, § 29.)—Colebrooke's opinion. *Vide Stra.* H. L. Vol. II, (2nd Ed.) p. 433.

* See Precedents pp. 189—192.

VRIHASPATI, however, states:—"Separated heirs, as those who are unseparated, are equal in respect of immovables; for one has not power over the whole to give, mortgage, or sell it." But this text is applicable to a case where, from difficulty of dividing the land itself in equal portions, the co-heirs enter into an agreement as to the division of its produce in times of harvest and divide actually the other property than the land actually belonging in common to the family. In such a case it is clear that none of the parceners has an exclusive and independent title to the land.—*Smri. Chan.* Chap. XV, Cl. 3.

As to the passage:—"Separated kinsmen, as those who are unseparated, are equal in respect of immovables: one has not power over the whole to make a gift, sale or mortgage,"*—it is only to indicate the distinction which there is in (regard to) immovable property, notwithstanding that the ownership of the members of an undivided family in the goods common to them is equal, and the alienation thereof (by one) without the consent of the rest is invalid.—*Vi. Mi. (Sans.)* p. 181.

Authority. The following passage:—"Separated kinsmen as those who are unseparated, are equal in respect of immovables; for one has not power over the whole, to make a gift, sale or mortgage;"*—must be thus interpreted:—'among unseparated kinsmen the *consent of all* is indispensably requisite, because no one is fully empowered to make an alienation, since the estate is in common.—Coleb. *Mit.* In. Chap. I, Sect. i, § 30. See the foot note in p. 80.

Authority. VRIDDHA YÁJNAVALKYA:—No one *(c)* is competent even to make a partition of the inheritance descended from ancestors *(b)*. It is simply to be enjoyed; there can be no gift or sale of the same.—*Smri. Chan.* Chap. VII, Cl. 49.

(*b*) *Inheritance descended from ancestors*] Land and the like belonging hereditarily to the family.—*Ibid.*

(*c*) *No one*] Not even the father or the like.—*Ibid.*

By the particle "*api*" (even) being added in the Sanskrit passage to the words "to make a partition," it is shown that want of power applies also to the sale and the like.—*Ibid.*

* A text of *Vrihaspati.* See page 73.

The conclusion, therefore, is that no partition, sale, or gift is to be made of hereditary immovable property, except with the assent of the co-heirs.—*Ibid.*, Cl. 50. So,—

66. A man is competent to alienate any portion of such property with the consent of his co-parceners or co-sharers, and not without it.* *Vyavasthá.*

VÁCHASPATI MISRA.—Consent is requisite only in the property which is joint, and not in that which is not joint.†—*Vi. Chi. (Sans.)* p. 37.

What is joint with others may be given with their consent.*—*Ibid.*, p. 37.

The assent of the co-sharers is required in the (alienation of) joint hereditary property whether movable or immovable.†—*Ibid.* p. 38. *Authority.*

67. Alienation of a proper portion of the joint family property by any of the unseparated co-parceners, even without the consent of the rest, is valid, if a calamity affecting the family require it, or support of the family make it unavoidable, or indispensable acts, religious or secular,—such as the *Vyavasthá.*

Annotations.

65—66. According to the doctrine of the Benares school, as prevalent to the Southward, a member of an undivided family must first obtain partition, before he can exercise individual ownership over his right in the joint property, without the consent of his co-parceners; a gift of undivided property, without such consent, being regarded by the Mitákshará as incompetent; at least so far as regards the *realty*.—*Stra.* H. L. Vol. I, (2nd Ed.) p. 261.

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* See *ante*, pp. 38, 39 and Precedents pp. 133—138, 149, 161, 190—193.

† The above translation has been made by the author of this work in consequence the translation (as contained in Baboo Prosunno Coomar Tagore's Book,) of the original of those three paragraphs, not being accurate.

obsequies of the father or the like, marriage of a daughter or the like, payment of revenue and repayment of *just* debts or the like,—render it necessary.*

Authority. VRIHASPATI:—Even a single individual may conclude a donation, mortgage or sale of immovable property during a season of distress, for the sake of the family, and especially for pious purposes. (See *ante*, p. 42.)

Authority. The meaning of that text is this: while the sons and grandsons are minors, and incapable of giving their consent to a gift and the like; or while brothers are so, and continue unseparated;† even one person, who is capable, may conclude a gift, hypothecation, or sale, of immovable property, if a calamity affecting the whole family require it, or the support of the family render it necessary, or indispensable duties such as the obsequies of the father or the like make it unavoidable.—*Mit.* In. Chap. I, Sec. i, § 29.

Authority. In a calamity affecting the family, any person (of that family) is competent even without the consent of the rest to make a gift, sale, or the like, even of immovable property, the support of the family being indispensable.—*Vi. Mit. (Sans.)* p. 181.

Authority. When any common danger happens or when a daughter of the family is to be married, and the like, even the undivided immovable property can be given or sold, by a person who has become separated.—*Vi. Chi.* p. 309.

Vyavasthá. **68. A disposal of immovable property being allowed under a legal necessity, or for a purpose prescribed by law, *á fortiori* movables may be disposed of for the same reason by any of the co-parceners.‡**

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* See *ante*, pp. 41—43, and Precedents pp. 6, 61 62, 63, 72, 78—85, 98, 101, 105, 118, 122, 136—138, 149, 176, 181—183, 185, 186, 190, 193, 194.

† See the Foot-note in page 42.

‡ See Annotations pp. 40, 44, 47, 48.

69. It has, however, been determined by the High Court of Madras that a member of an undivided family, without the consent of his co-parcener, is competent to alienate for *any* purpose *that* portion of the joint estate, to which, if partition took place, he would be individually entitled. While the High Court of Bombay has held that a member of an undivided family cannot *give away*, but can *sell* or *mortgage* for *any* purpose, his share in the joint estate without the consent of his co-parcencer.*

Vyavasthá, according to the High Courts of Madras and Bombay.

Such determinations appear to have been arrived at *not* in conformity with the *Mitákshará, Mayúkha, Smriti-Chandriká* and the other paramount authorities of those provinces, but in accordance with the opinions of Mr. Colebrooke, Mr. Ellis, and Sir Thomas Strange.†

Annotations.

67—69. It may be objected to VIJNYÁNESWARA and the *Smriti-chandriká* that the texts which prohibit gifts of any portion of joint property, or the whole of a man's sole property, thereby distressing his family, equally forbid sale and mortgage of it: so

* See Precedents pp. 139—146, 162, 189—194.

† In the last and most elaborate decision to the above effect, it has been thus observed by Chief Justice Westropp:—"As a general proposition, it is true that, in this Presidency, the *Mitákshará*, where not differing from the *Mayúkha*, is usually followed by the Courts upon questions of Hindú law. But this rule is not invariable. The courts have, in some instances, declined to follow either of those works. The doctrine of Mr. Colebrooke, Mr. Ellis, and Sir Thomas Strange, as to the right of alienation for valuable consideration by one of several co-parceners of his share in an undivided Hindú family estate, without the assent of the others, has been here preferred to that of the Mithilá and Benares schools; and as a logical consequence of that doctrine, the courts have recognized the right of a judgment creditor to take in execution, for the private debt of a parcener, his share in such undivided property." Precedents, p. 169.

"The foregoing authorities (*i.e.*, opinions of Colebrooke and the rest, and the decisions cited) lead us to the conclusion that it must be regarded as the settled law of this Presidency, not only that one of several co-parceners in a Hindú family may, before partition, and without the assent of his co-parceners, sell, mortgage, or otherwise alien, for valuable consideration, his share in the undivided family estate, movable or immovable, but also that such a share may be taken in execution under a judgment against him at the suit of his personal creditor. Were we to hold otherwise, we should undermine many titles which rest upon the course of decisions, that, for a long period of time, the courts on this side of India have steadily taken. Stability of decision is, in our estimation, of far greater importance than a deviation from the special doctrine of the *Mitákshará* upon the right of alienation."—*Ibid*, page 172.

Vyavasthá. **70. After division of the joint family estate, ancestral or acquired, the share of any individual member may be validly alienated by him without the consent of his separated parcener,* though it would be better if he were a consenting party.**

Reason. Because, by the effect of partition, the right which the son† and the rest had in the joint property having ceased to exist, and the several rights of the father and other co-sharers having accrued in particular parts of the property,‡ the father as well as any other sharer is now at liberty to alienate his own exclusive share (received in the partition) without the consent of his son and the rest who (except the son born after partition§) no longer possessed any right and power to prevent him from so doing.

Authority. NÁRADA:—When there are many persons sprung from one man (*d*), who have duties (*a*) apart, and transactions apart (*b*), and are separate in the materials of work (*c*), should they give or sell their own shares, they do all that as they

Annotations.

that these also would be void, although a valuable consideration have been paid and received. Injury and injustice may, however, be prevented, by holding him and his property answerable for the repayment of the money or valuable consideration received by him: and equity perhaps would award partition, for the purpose of enforcing payment from his share, thus rendered a separate one. But in the case of a gratuitous alienation, there are not the same difficulties; and I apprehend, that, under the Hindú law, as received among those with whom the Mitákshará and Smriti-chandriká are the chief authorities, it must be held that the disposal by will (considered as gift) of an undivided share of joint property, is not valid; nor of any part of it, unless for pious purposes, or other uses incumbent on the testator to provide for, and falling within the exception which the law makes to the general prohibition.—Colebrooke's opinion.—See *Stra.* H. L. Vol. II, (2nd Ed.) pp. 433 & 434.

* See Precedents pp. 90, 92, 147, 179, &c.

† See *ante*, pages 12—15. ‡ See foot-notes in page 72. § See Partition.

please: for they are masters of their own wealth.— *Vyav. Mayu.* Chap. IV, Sect. vii § 36; *Vi.* Chi. p. 314; *Vi. Mi.* (*Sans.*) p. 181; *Smri. Chan.* Chap. XV, Cl. 1.

(*a*) *Duties*] Ceremonials, that is, the five great sacrifices.— *Mayu.* Chap. IV, Sect. vii § 36.

(*b*) *Transactions*] Commerce, and the like worldly acts.—*Ibid.*

(*c*) *The materials of work*] Household necessaries, and the like, as the means of performing the acts (of the householder). *Ibid.*

By the separate existence of these, a partition is manifested. The sense is that they so separated, may (each), even without the consent of the others, make the gift, sale, or other alienation (of their respective shares).—*Ibid.*

(*a*) *Who have their duties apart*] Who perform religious rites such as *agni-hotra*, &c., requiring pecuniary aid for their performance, independently of each other.—*Smri. Chan.* Chap. XV, Cl. 1.

(*b*) *And transactions apart*] Who manage likewise the transactions concerning the income and expenditure of the divided wealth, and also the agricultural affairs, separately.—*Ibid.*

(*c*) *And are separate in the materials of work*] Who likewise possess separate household utensils and other materials.—*Ibid.*

(*d*) *When there are many persons sprung from one man*] When there are several persons descending from one man and divided in several ways.—*Ibid.*

Should one of these not consent to the act of the other, yet the latter is to disregard the consent and manage his own affairs. They are also at liberty to give, sell or mortgage their respective shares at pleasure, since each is lord of his own wealth, once divided.—*Ibid.*

The following passage*—"Separated kinsmen, as those who are unseparated, are equal in respect of immovables; for one has not power over the whole to make a gift, sale, or

* Which is a text of *Vrihaspati*: See *ante* page 78.

mortgage;"—must be thus interpreted: among unseparated kinsmen, the consent of all is indispensably requisite, because among the unseparated (*kindred*) *the estate being in common, no one is exclusive owner of a particular part;** but, among separated kindred, the consent of *all* tends to the facility of the transaction, by obviating any future doubt, whether they be separated or united: it is not required on account of any want of sufficient power, in the single owner; and the transaction is consequently valid even without the consent of separated kinsmen.—*Mit.* In. Chap. I, Sect. i, § 30. MITRA MISRA is also of the same opinion. See *Vi. Mi.* (*Sans*). page 171.

As for the text of VRIHASPATI: "Separated heirs as those who are unseparated, are equal in respect of immovables; for one has not power over the whole, to give, mortgage or sell it;"—according to *Madana*, it is for putting a stop to the right, among co-heirs, even separated as to their shares of (movable) effects, (though unseparated in other respects), to dispose of, by gift or other mode, without (general) consent, of grain, or the like, the produce of undivided fields, or other (fixed property). According to VIJNÁNESHWARA (and others) it is for the sake of obviating any future doubt, whether they be separated or united; for, by the consent of those separated,† the facility of the transaction is ensured.—*Vyav. Mayú.* Chap. IV, Sect. vii, § 37.

"All co-parceners have an equal claim to immovable property whether they be separated or live together. Therefore, one of them is not competent to make a gift of it, or to mortgage or sell it."—The purport of this passage is, that the property, which has been only nominally divided, remains common to all the heirs. Therefore, a single person is not its absolute master. If the entire property be divided, his act, whatever it be, is lawful.—*Vi. Chi.* p. 309.

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* The original of the Italicised portion is—"*a-vibhakteshu dravyashya madhyasthatwát eka-deshasyánisharatwát*:" of which the above is the accurate translation; but Mr. Colebrooke has rendered it by "because no one is fully empowered to make an alienation, since the estate is in common." See his Translation of Mit. In. Chap. I, Sect. i, § 30.

† The original of this is "*Vibhakta*" which means '*separated*,' and not "Unseparated," as is to be found in Stokes' edition of the translation of the *Vyavahára Mayúkha*.

71. Although a man may, without the consent of any person, alienate his sole property yet it is his bounden duty not to do so, unless what is to be aliened exceed the necessary subsistence of his family, whom he is bound to support, or unless the wants of the family, or other distress affecting the same, require more to be parted with.* *Vyavasthá.*

* See *ante*, pages 60—64, and the Annotations in pages 36, and 45.

BOOK II.

SUCCESSION OF HEIRS, &c.

CHAPTER I.

SUCCESSION OF THE BEGOTTEN SON AND (IN THE MALE LINE) GRANDSON AND GREAT-GRANDSON.

When a man's right of property ceases by his death, natural or civil, or by voluntary abandonment,*—

Vyavasthá. **72. His son(*a*) inherits from him.†**

Authority. BOUDHÁYANA:—Male issue of the body being in existence, the wealth goes to them.‡—*Ví. Mi. (Sans.)* p. 199.

Authority. A son (*a*), whether re-united with his father, or not re-united, shall obtain the entire paternal share, since the power of intercepting the right to take a share lies in the filial relation.—*Vyav. Mayú.* Chap. IV, Sect. ix, § 16.

Annotations.

72. Sir Thomas Strange says:—"In the series of a Hindú's heirs, the first, in order, is his male issue, legitimately born, or, in its default, its substitute, and equivalent, a legally adopted son."—Stra. H. L. (Second Ed.) p. 123. See, however, page 83 and *Vyavastha* No. 79.

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* See *ante*, pages 20—22.

† *Vide* Precedents pp. 195—199 and 222—224.

‡ The original of this text is—"*Satswangajeshu tad-gámi hyartho bhavati,*" of which the above is an accurate translation. Mr. Colebrooke, however, has made two different translations of the text in question: the one contained in his so called Digest (Vol. ii, p. 520) runs thus:—'Male issue by males *as far as the third degree* being left, the estate must go to them;' and the other is to be found in his translation of the *Dáya-bhága* (Chap. IV, Sect. ii, § 21) which is as follows:—"Male issue of the body being left, the property must go to them."

(a) Now, by the term 'son' must be understood 'the *ourasa* (a legitimately begotten son), 'the *dattaka*' or *datta* (a son given), '*kritrima*' (a son made), and *krita* (a son bought),'* the other descriptions of sons being obsolete in the present *(kali)* age. (See Adoption).

So if there be a son adopted *before* the birth of the *ouras* son, the former will inherit with the latter though not in equal shares.† As this Chapter is devoted only to begotten male issue, the proportion of the adopted son's share in the above case and the other particulars regarding him will be given in the book on Adoption.

'*Ourasa*' is the issue of the '*uras*' or breast, (whence of body), and born of a legally married wife (*patni*.) Thus, MANU :—" Him, whom a man has begotten on his wedded wife, let him know to be the first in rank, as the son of his body (*ourasa*)."‡ So according to MANU the *ourasa* son might be of two kinds; 1. born of a married wife equal in class with her husband; and 2. born of a married wife of a different class. But in the present (*kali*) age, marriage

Annotations.

72, 73. Sir William Macnaghten treats of the son's succession in these terms :—" According to the Hindú law of inheritance, as it at present exists, all legitimate sons, living in a state of union with their father at the time of his death, succeed equally to his property, real and personal, ancestral and acquired" (Vol. I, p. 17.) This, however, does not appear to be quite correct. First, because, a *dattaka* is also a legitimate or lawful son, but he does not succeed *equally* with the *ourasa* son of his adoptive father.† Secondly,

* The son adopted in the *Dattaka* form is prevalent in all the provinces of India, while that in the *Kritrima* form is used in *Mithilá*, and wherever the same is legalized by custom ; but the son bought is found only among *Gossaeens* or devotees who according to the custom, obtained amongst them, adopt sons or *chellas* in that form. All these are fully stated in the book on Adoption q. v.

† Under the ancient law subsidiary ones (*i. e.*, sons) participated, but not equally, with the legally begotton ; as does still the son *given* in adoption, as well as any other competent in the present age to be adopted.—Stra. H. L. Vol. I, (2nd Ed.) p. 187.

‡ Chapt. IX, *Vachana* 166.

with a damsel of an unequal class having been dis-allowed by law, and, consequently, a son begotten by a man on a woman of a different tribe, though married to him, not being a lawful son on account of his mother not being a legally married wife, the term *ourasa* must now be taken to mean a son as defined by the Sage BOUDHÁYANA (who says):—" A son who was begotten by a man himself on his wedded wife of *equal class*, let him know to be the (legitimate) son of his body (*ourasa*)." See Coleb. Dig. Vol. III, (Lon. Ed.) p. 157.

So also VÁCHASPATI MISRA, who says:—" Here the lawful wife is a woman of equal tribe espoused in lawful wedlock: a son begotten by himself on her is the first legitimate son, because the author says that one produced by himself on the lawful wedded wife of equal tribe is called legitimately begotten son (*ourasa*)."—*Vi. Chi. Sans.* p. 149. —See P. C. Tagore's translation, p. 284. See also Mit. In. Chap. I, Sect. xi, § 2.

Vyavasthá. 73. If there be several sons legitimately begotten and free from any defect causing exclusion from inheritance,* they inherit equally as well as simultaneously.†

Annotations.

because, the sons succeed as heirs to the patrimony not only at the time of their father's death, natural or civil, but also at the time of voluntary abandonment by him; thirdly, because, the circumstance of a son's living not in union with the father, does not exclude the former from inheritance where he has not already received his portion or somewhat in lieu or in satisfaction thereof: this is apparent from a precedent quoted by the learned compiler himself. See his work on Hindú Law, Vol. II, page 5.

73. Sons by different mothers inherit *equally*; and when a division takes place, it must be made, not with reference to the mothers, but

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* See the Chapter on Exclusion from Inheritance.

† *Vide* Precedents pp. 198, 199, 222, 223.

Ápastamba :—" All (sons) that are virtuous are entitled to shares." The term 'sons' is understood after the term 'all' in the above passage.—*Smri. Chan.* Chap. II, sect. ii, Cl. 16. Authority.

Vrihaspati :—Sons inherit the paternal estate, the shares(*b*) of all are equal.—*Ibid.*, Cl. 17. Authority.

(*b*) 'Shares'—here mean the shares of both assests and debts.—*Ibid.*

Manu :—After the death (*c*) of the father and mother, the brothers, being assembled, may equally (*d*) divide paternal (and maternal) estates, for they are not owners while they (the parents) live.—Chap. IX, *v.* 104. Authority.

(*c*) 'After the death'—that is, after the extinction of right (by death natural or civil, or by voluntary abandonment). See *ante* pp. 20—29.

(*d*) '*Equally*'—means in equal portions, no deduction of a twentieth part being allowed for the eldest son, and so forth. *Vi. Chi.* p. 224.

Here the term '*equally*' indicates that their title is *equal.*—Coleb. Dig. Vol. II, (Lon. Ed.), p. 531.

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74. The son begotten by a man of the *Shúdra* tribe on his female slave, or on the female slave of his slave, may, by the father's choice, take a share *Vyavasthá.*

Annotations.

the numbers of sons, *per capita.*—Norton's Leading Cases Part II, page. 496.

74. Among the sons of the *Shúdra* tribe, an illegitimate son by a slave girl takes with his legitimate brothers a half share; and where there are no sons (including son's sons, and grandsons), but only the son of a daughter, he is considered as a co-heir, and takes an equal share.—Macn. H. L. Vol. I, p. 18.

74. Where there are an illegitimate son and a legitimate daughter, the son gets one-third, and the daughter two, (Stra. H. L. Vol. I, pp. 57, 193,) in Bombay. According to the Mitákshará, they would take moieties.—Norton's Leading Cases, Part II, p. 499.

equal to that of a son begotten on a wedded wife; he is entitled to a moiety of such share upon his father's death, also upon the father leaving a daughter by a wedded wife or son of such daughter. In default of these, the son by the female slave is entitled to the whole of the father's property.*

Vyavasthá. **75. The son of a man of the re-generate tribe by his female slave, or by the female slave of his male slave, is not entitled to inherit from him; but such son, if docile, receives a maintenance.***

Authority. MANU:—But a son begotten by a man of the *shúdra* class on his female slave, or on the female slave of his male slave, may take a share of the heritage; if permitted *by the other sons*:† this is the law established.—Chap. IX, *vachana* 179.

Annotations.

74. The illegitimate son of a *Shúdra* by a slave is not entitled to share with legitimate sons, in the inheritance of an uncle by the father's side.—*Nissar Mortuzah* v. *Kowar Bhugwunt Roy.*—Marshall's Reports, page 609.

74. An illegitimate son succeeds before his father's widow. 1 W. and Bühl, p. 53, (*quære*); and before his legitimate brother's widow; *ib.*, (*quære*). He shares with a foster son; *ib.* p. 54.—Norton's Leading Cases Part II, p. 499.

75. According to the Hindú law, an illegitimate son of a *Rajpoot* or any of the *three* superior tribes, by a woman of the *shúdra* or other inferior class is entitled to maintenance only.—*Pershad Sing* v. *Ranee Mehesree.*—Sel. S. D. A. R. Vol. III, p. 132 (New Ed. page. 176.)

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* See Precedents, pp. 199—210, 213, 214, 217, 220, 221.

† The portion italicised is not in the original, but has been supplied by the learned Translator. The same, however, is not only at variance with the texts of *Yájnavalkya* and other paramount authorities, but also with *Kullúka Bhatta's* commentary on the text itself, according to all of which it should have been "*by the father;* as will be manifest from the passages cited in p. 87.

The son of a *Shúdra* by a female made a captive or slave, under a standard or the like, or by a female slave belonging to his male slave, if permitted *by his father*, shares equally with the sons of the wedded wife, that is, he obtains a share equal (to that of one of those sons): this is the settled rule of the *Shástra*.—*Kullúk Bhatta's* commentary on the above text.

YÁJNAVALKYA :—Even a son begotten by a *shúdra* on a female slave, may take a share, by the *father's choice*. But if the father be dead, the brethren should make him partaker of the moiety of a share: and one who has no brothers, may inherit the whole property in default of daughters' sons.—*Vide Mit.* In. Chap. I, Sect. xii, § 1.—*Vyav. Mayú.* Chap. IV, Sect. iv, § 32. Authority.

From specifying "*by a shúdra*," it is clear that a son begotten by a twice-born man on a female slave does not obtain a share, even by the father's choice: Neither after the death of the father, will he get the half; nor, in the absence of sons or other [heirs], will he get the whole. This is the argument of the *Madana-ratna*, and others. *Vyav. Mayú.* Chap. IV, Sect. iv § 32. Authority.

The son begotten by a *shúdra* on a female slave, obtains a share by the *father's choice*, or at his pleasure. But, after [the demise of] the father, if there be sons of a wedded wife, let these brothers allow the son of the female slave to participate for half a share:—that is, let them give him half [as much as is the amount of one brother's*] allotment. However, should there be no sons of a wedded wife, the son of the female slave takes the whole estate, provided there be no daughters of a wife, nor sons of daughters. But, if there be such, the son of the female slave participates for half a share only.—*Mit.* In. Chap. I, Sect. xii § 3. Authority.

From the mention of a *Shúdra* in this place, [it follows that] the son begotten by a man of a regenerate tribe on a female slave, does not obtain a share even by the father's choice, nor the whole estate after his demise. But, if he be docile, he receives a simple maintenance.—*Mit.* In. Chap. I, Sect. Xii § 3. Authority.

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* *Subodhini* and BÁLAM-BHATTA.

Descriptions of the different kinds of slaves are as follow:—

Slaves described.

MANU:—There are servants of seven sorts; one made captive under a standard *or in battle*, one maintained in consideration of service, one born of a female slave in the house, one sold, or given, or inherited from ancestors, and one enslaved by way of punishment *on his inability to pay a large fine.*—Chap. VIII, *v*, 415.

The fifteen kinds of slaves described.

The distinctions in slaves are laid down by Nárada:—"One born [of a female slave] in the house [of her master]; one bought; one received [by donation]; one inherited [from ancestors]; one maintained in a famine; and, like him, one pledged by a [former] master; one relieved from great debt; one made captive in war; [a slave] won in a stake; one [who has] offered [himself] in this form: 'I am thine;' an apostate from religious mendicity; [a slave for a] stipulated [time]; one maintained in consideration of service [*Bhakta*]; a slave for the sake of his bride; and one self-sold, are fifteen slaves declared by the law."—*Vyav. Mayú.* Chap. X § 5.

KÁTYÁYANA:—" A free woman, or one who is not a slave (of the same master; for this word, *a-dásí*, may bear either sense,) becoming the bride of a slave, also becomes a slave [to her husband's owner]; for her husband is her lord, and that lord is subject to a master."—*Vyav. Mayú.* Chap. X, para., 11.

The word slave, used throughout on this subject, being not specially confined to the masculine gender, must therefore be understood as affecting all rules also for female slaves. *Vyav. Mayú.* Chap. X. § 8.

Vyavasthá.

76. The son begotten by a man of the *shúdra* tribe on an unmarried *shúdrá* woman with whom carnal connection was not incestuous is also entitled to inherit from his father in the above manner. But such a son of a man of the regenerate tribe is entitled to maintenance only.*

* *Vide* Precedents, pp. 199, 211, 214.

MANU:—The son of a *Bráhmana*, a *Kshatriya*, or a *Voishya*, by a woman of the *Shúdrá* class, shall inherit no part of the estate, (unless he be virtuous; nor jointly with other sons, unless his mother was lawfully married:)* whatever his father may give him, let that be his own.—Chap. IV, *v.* 155;—*Vide Vyav. Mayú.* Chap. IV, Sect. iv, § 29, and *Vi. Chi.* p. 273. Authority.

MANU:—A son, begotten through lust on a *Shúdrá* by a man of the priestly class, is even as a corpse, though alive, and is thence called in law "a living corpse."—Chap. IX, *v.* 178. Authority.

VRIHASPATI:—A virtuous and obedient son, born of a *Shúdrá* woman unto a man who leaves no legitimate offspring(*a*), shall take a *provision for his* maintenance, and the kinsmen(*b*) shall inherit the remainder of the estate.—*Vi. Chi.* p. 274. Authority.

(*a*) 'Who leaves no legitimate offspring,'—that is who has no son by (any of the) wives of the first three classes.—*Ibid.*

(*b*) *Kinsmen*, first the nearest, and in their default, the remoter also.—*Vi. Chi.* p. 274.

This rule relates to the child of an unmarried *Shúdrá*; for the text is laid down in the section treating of an unmarried woman.—*Vi. Chi.* p. 274.

GOUTAMA:—A son by a *Shúdrá* woman, born unto a man who leaves no (legitimate) offspring, shall, if he be strictly obedient (like a pupil,) receive a provision for his maintenance(*c*).—*Vyav. Mayú.*—Chap. IV, Sect. iv, § 30. Authority.

(*c*) A *provison for his maintenance*; or, as a means of livelihood. *Vyav. Mayú* Chap. IV, Sect. iv, § 30.

"A son, begotten by a man of the *Shúdra* class on his female slave, may receive a share by the father's choice, or, after the death of the father, the brothers shall allot him half a share."—This text of YÁJNAVALKYA is thus interpreted by *Váchaspati Misra*:—

* The words within paranthesis are not in the text itself, but seem to have been added from a commentary.

Authority. "A son of a *Shúdra* by an unmarried woman may receive a share by the permission of his father; but, if the father be dead, he shall receive half of the share of his brothers who are borne by married wives."—*Vi. Chi.* p. 274.

Authority. Then the text—"should he have no brother, he shall take the whole, unless there be a daughter's son," is interpreted by him as follows :—" The meaning of the above is that, the son of a *Shúdra* by an unmarried woman receives the whole heritage, provided there be no son of married wives and daughters' sons.—*Vi. Chi.* p. 274.

It has been determined that—

Vyavasthá. **77. The son begotten by a *Shúdra* on a kept-woman with whom carnal connection is not incestuous is also entitled to inherit in the above manner; but such a son of a twice-born man is entitled only to maintenance.***

The above must be on her being considered to be a slave either of the description "I am thine," or "as one maintained in consideration of service (*bhakta*)." See *ante* p. 88.

Vyavasthá, **78. In default of the son, the son's son inherits, failing him, the great-grandson in the male line.†**

Annotations.

77. Issue by a concubine is described in the law as son by a female slave, or by a *Shúdrá* woman. If the father were a *Shúdra*, he might have allotted a share to his illegitimate son. Mit. on In. Ch. I, Sect. xii. And the obligation of affording him the means of subsistence is declared in passages quoted in JAGAN-NÁTHA'S Digest, Vol. III, p, 170.—*Colebrooke's* opinion. *Stra.* H. L. Vol. II, (F. E.) p. 198.

78—80. In default of sons, grandsons inherit, in which case they take *per stirpes*, the sons, however numerous, of one son, taking no

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* *Vide* Precedents pp. 199—214, 226.

† *Vide* precedents pp. 197, 217, 222—224.

The right of performing the funeral obsequies is settled according to the following authority:—"The son, the son of a son, the son of a grandson:" hence their right of inheritance, which is similar to the right of performing the funeral obsequies, is likewise established.—*Vi. Chi.* p. 289. **Authority.**

First, the son; on failure of him, the grandson; in his default, the great-grandson (inherits).—*Vi. Chi.*, p. 299. **Authority.**

Annotations.

more than the sons, however few, of another son.—Macn. H. L. Vol. I, p. 18.

78—80. In default of sons and grandsons, the great-grandsons inherit, in which case, they also take *per stirpes*, the sons, however numerous, of one grandson, taking no more than the sons, however few, of another grandson. They will take the shares to which their respective fathers would have been entitled, had they survived.—Macn. H. L. Vol. I, p. 18.

The right of representation is also admitted, as far as the great-grandson; and the grandson and great-grandson, the father of the one and the father and grandfather of the other being dead, will take equal shares with their uncle and grand-uncle respectively. Indeed, the term '*put-tra*' or 'son' has been held to signify, in its strict acceptation, (also) a grandson and great-grandson.—*Ibid.*, p. 17.

The collective term "issue" comprehending not only as many sons as a man may chance to leave behind him, but sons' sons also, and sons of the latter or great-grandsons.—If the son have died in the life-time of his father, leaving a son, and that son also die leaving one, and then the grandson die, the great-grandson succeeds, as his grandfather would have done, had he survived.—*Stra.* H. L. Vol. I, (2nd Ed.) p. 124).

A son, dying in the life-time of the father, leaving sons, representation takes place, proceeding as far as great-grandsons, upon the ground of their conferring, by performance of funeral obsequies, equal benefit on the ancestor; the key (as observed by Sir William Jones) to the whole Indian Law of Inheritance.—*Stra.* H. L. Vol. I, (1st Ed.) p. 116.

Vyavasthá. **79. The grandson whose father is dead, and the great-grandson whose father and grandfather are dead, are entitled to inherit simultaneously with the late proprietor's surviving son, if any.***

Reason. For the grandson representing his own father, and the great-grandson representing his grandfather as well as father, are in the stead of the late proprietor's deceased son and grandson,† and they equally with his surviving son confer on him the spiritual benefit by presentation of the oblation of food and libation of water.

Vyavasthá. **80. If the grandsons and the great-grandsons of the above description be numerous, and they be sons and grandsons of different fathers and grandfathers, then they inherit not *per capita*, but *per stirpes*.‡**

Authority. JÁGNYAVALKYA:—Among grandsons by different fathers, the allotment of shares is according to the fathers.—*Mit.* In. Chap. I, Sect. v, § I;—*Vyav. Mayu* Chap. IV, Sect. iv, § 20;—*Vi. Chi.* (*Sans.*) p. 181.

Authority Although grandsons have by birth a right in the grandfather's estate, equally with the sons, still the distribution of the grandfather's property must be adjusted through their fathers, and not with reference to themselves.§—*Mit.* Chap. I, sect. v, § 2.

Although the grandsons' title being equal, and their right by birth being also equal (to that of a son,) it is

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* *Vide* Precedents pp. 196, 217, 222—224.

† See *ante*, pp. 19, 29, 30. ‡ *Vide* Precedents pp. 217, 223.

§ The meaning here expressed is this : if unseparated brothers die, leaving male issue, and the number of sons be unequal, one having two sons, another three, and a third four, the two receive a single share in right of their father, the other three take one share appertaining to their father, and the remaining four similarly obtain one share due to their father. So, if some of the sons be living and some have died leaving male issue, the same method should be observed : the surviving sons take their own allotments, and the sons of their deceased brothers receive the shares of their own fathers respectively. Such is the adjustment prescribed by the text.—*Mit.* In. Chap. I, Sect. v, § 2.

reasonable that they should take equal shares (with a son,) yet this is barred by the text:—"Among grandsons by different fathers, &c."—*Vi. Mi.* (*Sans.*) p. 182.

The author of the *Smriti-chandriká* having used the word "*aneka* (many or different)" in the place of "*pramíta* (deceased)" contained in the above text of YÁJNAVALKYA, as found in the *Mitákshará*, has thus interpreted the text:—"Among those whose fathers are deceased, the allotment of shares is according to the fathers."* Among those whose fathers are deceased.] Among brothers whose fathers have died undivided. The allotment of shares is according to the fathers.] The shares of the property left by the father, grandfather and great-grandfather are to be adjusted through their† respective fathers, and not with reference to themselves.—*Smri. Chan.* Chap. VIII, Cls. 1 and 2. Authority

If it be asked what distinction does a partition make if made through fathers ?‡

VRIHASPATI states:—"Their sons of unequal number are declared to take the shares of their respective fathers." *Vide Smri. Chan.* Chap. VIII, § 3. Authority.

The meaning is, where the sons of the deceased fathers are of unequal number, that is, of greater or less number, the sons of each father take the share of their own father only. For example, when one has a single son, another two, and a thrid many; the only son receives one share in right of his father, the two sons take one share appertaining to their father, and similarly the many sons obtain one share due to their father. Although, by the shares being thus adjusted through fathers, there might occur inequality in the shares of sons by different fathers, yet such a mode of adjustment must be observed as being expressly enjoined. *Smriti. Chan.* Chap. VIII, Cls. 4, 5.

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* The above translation of the said text of *Yájnavalkya* is made by the Translator of the *Smriti Chandriká*.

† This term refers to the grandsons, or great-grandsons, as the case may be.—Note by the Translator.

‡ *Smri Chan.* Chap. VIII, Cl. 3.

Where among unseparated brothers having sons, one dies, and his son has received no share from his grandfather, and the grandfather dies,*

Authority. KÁTYÁYANA says:—Should a younger brother [*anuja* (*a*)] die before partition, his share shall be allotted to his son, provided he has received no fortune (*b*) from his grandfather; a son's son shall receive his father's share from his uncle or from his uncle's son.†

(*a*) The term '*anuja*'‡ has been used in the text to denote a deceased brother in general, whether he be a junior or senior brother.—*Smri. Chan.* Chap. VIII, Cl. 6.

(*a*) The younger son (*anuja*) denotes also that the eldest (is bound to portion off his brother's son).—*Vyav. Mayú.* Chap. IV, Sect. iv, § 21.

(*b*) "Fortune" means the wealth called 'heritage.'—*Smri. Chan.* Chap. VIII, Cl. 6.

Where there may be several sons of a deceased brother, then, too, the same author*—

Authority. KÁTYÁYANA states:—The same shall be allotted equitatably to all the brothers.(*c*)†

(*c*) Shall be allotted equitably to all the brothers.] Shall be divided in equal shares among all the sons, according to the principle.—" Equality is the rule where there is nothing laid down to the contrary.—*Smri. Chan.* Chap. VIII, Cl. 7.

Again says—

Authority. KÁTYÁYANA:—Or (if that grandson be also dead) let his son take the share; beyond him succession stops(*d*).†

(*d*) '*Stops,*' at the great-grandson. We must thus understand it: 'The son of the great-grandson, or the

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* *Smri. Chan.* Chap. VIII, Cl. 6—8.

† *Smri. Chan.* Chap. VIII, Cl. 6—8; *Vyav. Mayú.* Chap. IV, Sect. iv, § 21;—*Vi. Mi.* (*Sans.*) p. 199.

‡ The term "*anuja*" in Sanskrit means a younger brother.

rest, will not, on the death of the father [grandfather, and great-grandfather, without interval after the death of the great-great] grandfather, obtain his wealth, being of another [line], so long as his son, or other [heirs] are alive. In default of son, grandson, [and great-grandson] in the general [family] only, he also will take [the succession]. *Vyav. Mayú.* Chap. IV, Sect. iv, § 22.

The meaning is, that the son of the grandson of the deceased proprietor takes, in default of his father, the share of his father. Where there is no such son too, (*i. e.*, son of the grandson,) but his sons are in existence, they, as the descendants of the deceased proprietor, do not take a share in the property of their great-great-grandfather. The right of inheritance here ceases.—*Smri. Chan.* Chap. VIII, Clause 9.

The objector asks—" how does a great-grandson at least take a share in his great-grandfather's property; the right by birth being ordained by law only where the son or grandson inherits the property of his father or grandfather ?"

This is true, but a great-grandson has been declared entitled to his great-grandfather's property, just on the same principle on which a son and the like have been declared entitled to their mother's property. This is simply because they survive the deceased, and offer funeral oblations to her. It has hence been properly declared—" Let his son take the share." It must hence be understood that whoever, by reason of the deceased proprietor being related to him as father, grandfather, or great-grandfather, offers funeral oblations to him, becomes entitled to participate in his (deceased's) property notwithstanding that the deceased has got other sons, grandsons, and the like. Hence, DEVALA :—" Sages declare partition of inheritable property to be co-ordinate with the gifts of funeral cakes." The meaning is, that MANU and other sages contemplate the partition of inheritance as well as the presentation of funeral oblations to extend to the fourth in descent.—*Smri. Chan.* Chap. VIII, Cls. 11—14.

The heritable right of the great-grandson whose father and grandfather are dead is not only by reason of his pre-

senting the oblation-cake, but also by his being consubstantial with his father and grandfather. A grandson, even during the existence of his father, has, by birth, a heritable right in his grandfather's property, whereas a great-grandson's heritable right accrues only upon the demise of his father and grandfather: such is the distinction.*

Authority. KÁTYÁYANA expressly declares the heritable right of sons, grandsons and great grandsons:—" Should a son die before partition, his son shall be made a partaker of the estate provided he had received no fortune (share) from his grandfather. He recovers his father's share from his uncle or uncle's son; and the same (proportionate) share shall be according to law allotted to all the brothers; or (if that grandson be also dead) let his son take the share; beyond him (*i. e.* great-grandson, lineal sucession) stops.†—*Vi. Mi.* (Sans.) page 199.

The non-inheritability, which is declared of the descendants beyond the great-grandson, is considered to be on the ground of *sapinda* relation; but they have certainly heritable right on the ground of being *Sakulyas* or distant kindred.—*Vi. Mi.* p. 199.

Although the author of the *Mitákshará* has not, in the Chapter on Inheritance, mentioned the heritable right of the great-grandson whose father and grandfather are dead, nor has he cited the above quoted text of KÁTYÁYANA by which such descendant's right of succession is expressly declared, yet by saying in the Chapter treating of debts that "if the great-grandson and the rest take the inheritance, then they must be made to pay (the deceased's) debts"—he has, though indirectly, recognised the heritable right of the great-grandson. Besides, when the *Vír-mitrodoya*, which next to the *Mitákshará* is a high authority of the Benares School, and is considered to be an exposition of the laws of the *Mitákshará*, has plainly laid down the great-grandson's right of succession, and the authorities of the other schools too have done the same, then such descendant's

* See *ante*, pages 18, 19

† *Vide* Coleb. Dig. Vol. III, (Lond. Ed.) pp. 7, 8, and 82.

heritable right must be held to be unquestionably established. In practice also he invariably inherits in, and under, the above circumstances.*

DEVALA:—"Partition of heritage among undivided parceners, and a second partition among divided relatives living together (after re-union,) shall extend to the *fourth* in descent: this is a settled rule. So far (*a*) relatives are *sapindas*, or connected by funeral oblations; beyond him (*b*) the funeral cake is rescinded: sages declare (*c*) partition of inheritable property to be co-ordinate with the right of funeral cakes.—Coleb. Dig. Vol. III (Lon. Ed.) p. 10. Authority.

(*a*) "So far" as the fourth in desceut, relatives or persons sprung from the same family are *sapindas*: for example, one gives the funeral cake, the other three receive the oblation: hence there is a mutual connexion, by the gift and receipt of funeral cakes, between four persons. And this connexion of *sapindas* regards inheritance; but the connection of *sapindas*, in respect of impurity by reason of death, extends to the seventh in descent, including the ancestors, who partake of the rice wiped off the hand with which the funeral balls are offered.—Coleb Dig. Vol. III (Lon. Ed.) p. 11.

(*b*) "Beyond him (beyond the fourth in descent), the funeral cake is rescinded;" for there is not, between more distant relatives, the mutual connexion of giving and receiving funeral balls.—*Ibid.*

(*c*) "Sages declare," &c.;—they declare the succession of inheritable property to be co-ordinate with the gift of funeral cakes. Consequently, he who offers the double set of oblations and the funeral cake, succeeds to the heritage. —*Ibid.*

81. The grandson whose father and the great-grandson whose father and grandfather are living are not entitled to inherit.† *Vyavasthá.*

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* See *ante*, pp. 91—94.

† *Vide* precedents pp. 196, 217, 222—224.

Authority. The grandson and great-grandson whose fathers are alive not offering the oblation-cake by reason of their having no right to perform the *párvana* (*i. e.*, to present the double set of oblations) have no right to inherit the property of their grandfather and great-grandfather.—*Ví. Mi.* (*Sans.*) page, 181.

CHAPTER II.

RIGHT OF SUCCESSION TO THE ESTATE OF A MAN, WHO LEAVES NO SON, SON'S SON, AND (IN THE MALE LINE) GREAT-GRANDSON.

SECTION I.

Widow's Right of Succession.

Yájnavalkya thus relates the order of succession to the property of a man, who, being separated and not re-united, dies leaving no son (*b*):—

"The wife, and the daughters also, both parents, brothers likewise,* and their sons, gentiles, cognates, a pupil, and a fellow student (in the *Veda*): on failure of the first among these, the next in order is heir to the estate of a man who departed for heaven (*a*) leaving no son [*a-puttra* (*b*)]. This rule extends to all (men and) classes (*c*)."—*Vide Mit.* In. Chap. II, Sect. i, § 2;—*Vyav. Mayú.* Chap. IV, Sect. viii, § 1.

(*a*) Departed for heaven] Departed for another world.—*Mit.* In. Chap. II, Sect. i, § 3.

(*b*) Leaving no son (*a-puttra*)—that is leaving no son, son's son, and (in the male line) great-grandson.—*Vi. Chi.* p. 289.

The term "Leaving no son (*a-puttra*)" means 'leaving no heir down to the great-grandson in the male line, inasmuch as a widow takes the inheritance in the case where there is no male issue as far as the great-grandson.—*Vi. Mi.* (*Sans.*) p. 198.

"He, who has not (any of) the twelve descriptions of sons already stated, is one 'leaving no sons'."—*Mit. Sans.* p. 207. *Vide* Colebrooke's translation, p. 325.

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* "*Brothers likewise*":—This is understood by Bálam Bhatta as signifying both brothers and sisters.

Although the author of the *Mitákshará* has interpreted the term "leaving no son (*a-puttra*)" to mean one who is destitute of (any of) the twelve descriptions of sons, still here the term "*a-puttra*" (leaving no son or destitute of a son), must be understood to mean 'destitute of a grandson and great-grandson also; as otherwise, that is in the case of the term 'son' being taken to signify only a son, it would follow that a wife or widow would succeed notwithstanding the existence of a grandson and great-grandson in the male line; which is contrary to law as well as to the established practice. Therefore, the foregoing interpretation of the term '*a-puttra*' given in the *Vivàda-chintàmani* and *Vír-mitrodaya* is alone proper.

(*c*) "To all"—that is, this rule, or order of succession, in the taking of an inheritance, must be understood as extending to all tribes, whether the *Múrdhávashikta* and others in the direct series of the classes, or *súta* and the rest in the inverse order; and as comprehending the several classes the sacerdotal and the rest.—*Vide Mit.* In. Chap. II, Sect. i, § 4.

Of a man, thus leaving no male progeny, and going to heaven, or departing for another world, the heir or successor is that person, among such as have been here enumerated, *viz.*, the wife and the rest, who is next in order, on failure of the first mentioned respectively. Such is the construction. In the first place, the wife shares the estate. *Mit.* In. Chap. II, Sect. i, § 3 and 5. Therefore,—

Vyavasthá. **82. When a man, who was separated from his co-heirs and not subsequently re-united with them, dies leaving no son, and (in the male line) grandson and great-grandson, his wife *(patní)*, if chaste, and capable of performing *sráddhas* and other religious acts, takes his inheritance.***

Authority. When a man, who was separated from his co-heirs and not subsequently re-united with them, dies leaving no son,† his

* See Precedents, pp. 227—241, 260, 400 and 401; see also pp. 473—484.

† See the last page.

widow takes the estate in the first instance.—*Mit.* In. Chap. II, Sect. i, § 30.

It is a settled point that on failure of heirs down to the great-grandson (in the male line), the wife takes the inheritance of her husband who died separated from, and not re-united with, his co-heirs.—*Vi. Mi.* (*Sans.*) p. 199. Authority.

As secondary sons are better competent to confer benefits, temporal and spiritual, on the deceased than the father and the like, and are hence his nearer relations, so are widows also (as appears from a careful examination of the *Vedas, Smritis,* &c.,) better competent to confer benefits, temporal and spiritual, on the deceased than the father and the like, and are therefore his nearer relations compared with the father and the rest.—*Smri. Chan.* Chap. XI, Sect. i, cl. 3. Authority.

Annotations.

82. In default of sons, grandsons, and great-grandsons in the male line, the inheritance descends lineally no farther, and the widow inherits, according to the law as current in Bengal, whether her late husband was separated, or was living as a member of an undivided family; but according to other schools, the widow succeeds to the inheritance in the former case only; an undivided brother being held to be the next heir.—*Macn.* H. L. Vol. I, p. 19.

According to the law, as it prevails in Bengal, where an undivided coparcener dies, leaving a childless widow; his share does not vest in the surviving parceners, but descends to his widow, as his heir; whereas, the *Mitâkshará* restricts her right of inheriting to the case of her husband so dying separated; allowing her, where he dies undivided, a maintenance only. In every other case, universally, survivorship takes place, the remaining coparceners continuing to administer and enjoy the undivided property, as will appear in the chapter on Partition.—Str. H. L. Vol. I, (2nd Ed.) page 121.

A re-united parcener dying while the re-union continues, leaving no issue, but a widow, according to the *Mitâkshará*, she is entitled to maintenance only, the deceased's share vesting by survivorship in his coparceners.—Str. H. L. Vol. 1, (2nd Ed.) p. 234.

It is hence inferrible that MANU declared the estate of a sonless man inheritable by the father, *in default of even the widow.*—*Smri. Chan.* Chap. XI, sect i, cl. 3.

Authority. In default of a great-grandson (in the male line) the estate devolves on the widow.—*Vi. Chi.* p. 289. On this subject—

Authority. VRIDDHA MANU says:—"The widow of a sonless man, keeping unsullied her husband's bed (*d*), and persevering in religious observanees (*e*), shall present his funeral oblation and obtain (*f*) also (his) entire share (*g*)*.—*Mit.* In. Chap. II, sect. i, § 6.

(d). Keeping unsullied her husband's bed] Being chaste.—*Smri. Chan.* Chap. XI, Sect. i, cl. 17.

Keeping unsullied her husband's bed] Not allowing any other man to have access to her husband's bed; that is, being chaste.

(e) Persevering in religious observances] Practising religious ceremonies even during the life-time of the husband with husband's permission, it being declared by *Shankha* and *Likhita:* "The duty of a wife is to commence wilfully the religious observances, fastings, sacrifices, &c., with the permission of her husband."—*Smri. Chan.* Chap. XI, Sect. i, Cl. 17.

It is hence to be understood that the author of the passage indirectly points out that a *patni,* to inherit her husband's estate, must also be *a pious* woman.—*Smri. Chan.* Chap. XI, sect. i, Cl. 18.

Persevering in religious observances] Performing the duties of widowhood.† *Vide* Colcb. Dig. Vol. III, p. 479.

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* *Vi. Chi.* p. 288.—*Smri. Chan.* Chap. XI, sect. i, § 15.—*Vi. Mi.* (Sans.) p. 193.

† The duties of widowhood are as follows:—

VYÁSA:—After the death of her husband, let a virtuous woman observe, the duty of continence, and let her daily, after the purification of the bath present, from the joined palms of her hand, water mixed with *til* (sesamum) to the *manes* of her husband. Let her day by day perform with devotion the worship of the Gods, and the adoration of Vishnu, practising constant abstemiousness. She should give alms to the chief of the venerable for increase of holiness, and keep the various fasts which are commanded by sacred ordinances. A woman who is assiduous in the performance of duties

(f) The words "obtains also" have been used (in the above text of VRIDDHA MANU) to show that a *putní* who, by reason of her

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conveys her husband, though abiding in another world, and herself (to a region of bliss).

MANU :—Let her emaciate her body, by living voluntarily on pure flowers, roots and fruits; but let her not, when her lord is deceased, even pronounce the name of another man. Let her continue till death forgiving all injuries, performing harsh duties, avoiding every sensual pleasure, and practising the incomparable rules of virtue, which have been followed by such women as were devoted to one only husband. Many thousands of *Bráhmanas* having avoided sensuality from their early youth, and having left no issue in their families, have ascended (nevertheless) to heaven. And like those abstemious men, a virtuous wife ascends to heaven, though she have no child, if, after the decease of her lord, she devote herself to pious austerity. But a widow who, from a wish to bear children, slights her (deceased) husband (by marrying again,) brings disgrace on herself here below, and shall be excluded from the seat of her lord. —Chap. v.

YAMA :—Let her continue, as long as she lives, performing austere duties avoiding every sensual pleasure, and cheerfully practising those rules of virtue which have been followed by such women as were devoted to one (only husband.) Neither in the *Vedas*, nor in the sacred code, is religious seclusion allowed to a woman : her own duties, practised with a husband of equal class, are indeed her religious rites : this is the settled rule. Eighty-eight thousand holy sages of the sacerdotal class, superior to sensual appetites, and having left no male issue, have ascended (nevertheless) to heaven. Like them a damsel, becoming a widow, and devoting herself to pious austerity, shall attain heaven though she have no son : this MANU, spring from the Self-existent, has declared.—

VISHNU :—After the death of her husband, a wife must practise austerities, or ascend (the pile) after him.

HÁRÍTA :—Leaving her husband's favorite abode, keeping her tongue, hands, feet and (other) organs in subjection, strict in her conduct, all day mourning her husband, with harsh duties, devotion, and fasts to the end of her life, a widow victoriously gains her husband's abode, and repeatedly acquires the same mansion with her lord, as is thus declared: "That faithful woman who practises harsh duties after the death of her lord, cancels all her sins, and acquires the same mansion with her lord."

VRIHASPATI :—A wife is considered as half the body of her husband, equally sharing the fruit of pure and impure acts : whether she ascend (the pile) after him or survive for the benefit of her husband, she is a faithful wife. Strict in austerities and rigid devotion, firm in avoiding sensuality, and ever patient and liberal, a widow attains heaven, even though she have no son.

SMRITI :—"Only one meal each day should ever be made (by a widow,) not a second repast by any means; and a widowed woman, sleeping on a bedstead, would cause her husband to fall (from a region of joy.) She must not again use perfumed substances : but daily make offerings for her husband with *kusa*-grass, *til* and water. In the months of *Boishákha*, *Kártika*, and *Mágha*, let her observe special fasts, perform ablutions, make gifts, travel to places of pilgrimage, and repeatedly utter the name of *Vishnu*.

KÁTYÁYANA :—Though her husband die guilty of many crimes, if she remain ever firm in virtuous conduct, obsequiously, honouring her spiritual parents, and devoting herself to pious austerity after the death of her husband, that faithful widow is exalted to heaven, as equal in virtue to Arundhati.

Vide Ratnákara, and Coleb. Dig. Vol. II, (Lond. Ed.) pp. 460—465.

marriage, acquired ownership* but of a dependent character over the entire property of her husband, obtains on his demise, independent power† over it.—*Smri Chan.* Chap. XI, Sect, i, Cl. 19.

In the second hemistich of the passage, an inverse order in point of construction must be observed. It must be construed that a *Patní* possessing the qualifications referred to, ought exclusively to take, first, the whole estate of her husband and then offer his funeral oblations; and that, during her life-time, neither the brother nor the rest are competent either to take the inheritance or to perform the obsequies.—*Ibid.*, Cl. 16.

Since a woman has not yet performed the duties of widowhood and the like, how can she have a title to the inheritance *immediately* after the death of her husband? She has an immediate title, because she is disposed to perform those duties.—Coleb. Dig. Vol. III. (Lond. Ed.) p. 479.

(g) In the following passage of PRÁJAPATI the meaning of the words "funeral oblations" and "entire" (used in the above text of VRIDDHA MANU) has been explained: "Having taken his movable and immovable property, the precious and the base metals, the grains, the liquids and the clothes, let her duly offer his monthly, half-yearly, and other funeral repasts. With presents offered to his *manes* and by pious liberality, let her honor the paternal uncles of her husband, his spiritual parents (*guru*), and daughter's sons, the children of his sisters, his maternal uncles, and also aged and unprotected persons and guests.—*Smri. Chan.* Chap. XI, Sect. i, Cl. 20.

Authority. In conclusion, it is to be understood, that the law allowing a widow *(patní)* to take the entire share of her husband, is applicable to the case of a parcener dying divided,‡ and without *re-union.*—*Ibid.*, Cl. 54.

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* This is according to the text "Wealth common to the married pair." See Sanscrit, page 97.

† This independent power, however, is only in religious acts and legal necessities. *See Vyavasthás* 103, 104 and the authorities, &c., relative thereto.

‡ From its being laid down that a widow becomes entitled to succeed where the husband dies *divided*, it is understood that where the husband dies *undivided*, his father, brother, or the like, who lived in union with him takes the property of the sonless man.—*Smri. Chan.* Chap. XI, Sect. i, Cl. 25.

VRIHASPATI, therefore, observing that wives are more closely allied to the deceased than any one else by reason of their conferring benefits, temporal and spiritual, on him, holds (by the following passage) that the widows alone are entitled to inheritance in default of secondary sons, notwithstanding the existence of the father and relations as far as *sakulyas.*

VRIHASPATI:—In Scripture (*h*) and in the code of law (*i*), as well as in popular practice (*j*), a wife (*patní*) is declared by the wise to be half of the body (of her husband), equally sharing the fruit of pure and impure acts. Of him whose wife is not deceased, half the body survives. How then should another take his property, while half his person is alive. Let the wife of a deceased man, who left no male issue, take his share, notwithstanding kinsmen, a father, a mother, or uterine brother, be present. Dying before her husband, a virtuous wife [*pati-vratá** (*l*)] partakes of his consecrated fire [*agni-hotra* (*k*)] : or, if her husband die (before her,) she takes his wealth: this is a primeval law. Having taken his movable and immovable property, the precious and base metals (*m*), the grain, the liquids, and the clothes, let her duly offer his monthly, half yearly and other *sráddhas* or funeral repasts. With presents offered to his manes [*kavyam (n)*] and by pious liberality [*púrtam* (*o*)], let her honor the paternal uncle of her husband, his spiritual parents, and daughter's sons, the children of his sisters, his maternal uncles, and old men [*vriddha (p)*] and unprotected persons, guests and females [*striyah (q)*]. Those near and distant kinsmen, who become her adversaries, or who injure (her) property, let the king chastise by inflicting on them the punishment of robbery.† Authority.

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* *Pati-vratá* (composed of '*pati*' a husband, and '*vrata*' a religious obligation) means a woman who never violates her marriage vow : whence Mr. Colebrooke has rendered it by "a virtuous wife," Krishna Swámí Ayer by "a chaste woman," and Baboo P. C. Tagore by "a faithful wife."

† In the *Dáya-bhága* and other Bengal authorities, all of these *Vachanas* or texts have been cited as of *Vrihaspati*, while in the *Viváda-chintámani*, *Víra-mitrodoya* and *Smriti-chandriká* most of them have been quoted as such and the rest as of PRÁJAPATI, but in the *Vyavahára-mayúkha* only a few of them have been cited as being of PRÁJAPATI. See *Dáya-bhága*, Chap. XI, Sect. i, § 2;—*Coleb. Dig.* Vol, III, (Lond. Ed.) p. 458 ;—*Viváda-chintámani* pp. 289,290 ;—*Vír-mitrodoya* (sans.) pp. 193-195 ;—*Smriti-chandriká, Chap.* XI, Sect. i, Cls. 4 and 12; see also *Mitákshará* (Chap. II, Sect. i. § .6) in which only one of the above verses has been cited.

(h) In Scripture] In the *Veda* (which says): "She who is a wife *(patní)* is half of her husband's body *(átmanah)* itself."* The word *'átmanah'* means body.—See *Smri. Chan.* Chap. XI, Sect. i, Clause 6.

(i) In the Code of law] In the *Dharma Shástra* (wherein it is laid down thus): "Of him whose wife drinks wine, half his body sinks. In the case of him, half of whose body has sunk, no expiation is prescribed."—*Ibid.*, Cl. 7.

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* If the wife be half the body of her husband, may she not exclusively take his wealth, although sons, or other male descendants be living? No; for, the Scripture says:—"It is a person's own soul which is born to him (or her) as a son." MANU also says:—"The husband, after conception by his wife, becomes himself an embryo, and is born a second time here below; for which reason the wife is called *jáyá*, since by her he is born *(jáyate)* again." (Ch. IX, v. 8.) So also say SANKHA and LIKHITA:—"Let a priest take the hand of a woman equal in class; the bodies of his ancestors are born again of her. Let him figuratively address his own soul in the person of his son: 'Sprung from the several limbs, (especially) from the breast, thou my soul art called *son*: mayest thou live for a hundred years? For the benefits conferred on parents, thou, my soul, art called son; because thou deliverest *(tráyase)* from the hell called '*put*,' therefore thou art named *(put-tra)* son." And it appears from these, that a son or other descendant is consubstantial with the father and other ancestors. (See Coleb. Dig. Vol. III, p. 459.) Further, MANU and VISHNU say:—"Since a son delivers *(tráyate)* his father from the hell called '*put*,' therefore he is named '*puttra*' by the Self-existent himself." (MANU 9,138; VISHNU 15,43.) So says also HÁRÍTA: "Certain hells are named *put* and *chhinna-tantu*, a son is therefore called *put-tra*, because he delivers his father from those regions of horror." In like manner SANKHA and LIKHITA declare: "A father is exonerated in his life-time from the debt to his own ancestors, upon seeing the countenance of a living son: he becomes entitled to heaven by the birth of his son, and makes his own debt devolve on him. The sacrificial hearth, the three *vedas*, and sacrifices rewarded with ample gratuities, have not the sixteenth part of the efficacy of the birth of an eldest son." Thus also MANU, SANKHA, LIKHITA, VISHNU, VASHISHTHA and HÁRÍTA: "By a son, a man conquers worlds; by a son's son, he enjoys immortality; and, afterwards, by the son of a grandson, he reaches the solar abode." (MANU 9: 137; VASHISHTHA 17-5; VISHNU, 15-45). YÁGNYAVALKYA likewise says: "The continuance of race and attainment of heaven depend on a son, grandson and great-grandson (1. 78)." Thus since the sons and other male descendants produce great spiritual benefit to their father or ancestor from the moment of their birth, and they present the oblation-cake at the *parvas* to their deceased father, the proprietary right of sons and the rest is ordained, as already inferible from reasoning; because the property devolving upon sons and the rest benefits the deceased; and since there can be no other purpose of speaking of the various benefits derived from sons and the rest, while treating of inheritance, it appears to be a doctrine to which MANU assents, that the right of succession is grounded solely on the benefits conferred. It, therefore, clearly appears that the estate of the deceased should go first to the son, grandson, and great-grandson, and on failure of the son and the rest, the succession should devolve on the widow: and this is reasonable.

(j) In popular practice] In the *Shástra* exhibiting the laws sanctioned by popular usage (wherein it is provided): "Which learned will renounce a wife, who is half of the body?"—*Smri. Chan.* Chap. XI, Sect. i, Clause 8.

(k) By the word—"*Agni-hotra,*" (used in the text) is meant the fire belonging to the consecrated hearth,—*Ibid,* Cl. 12.

(l) '*Pati-vratá*' is thus defined by HÁRÍTA: "She, who suffers pain when her lord endures it (that is becomes affected in mind by similar anguish), is cheerful when he is so, in his absence pines under the anguish of separation, and is squalid (through the neglect of ornament and dress), and who dies when he expires (that is follows him in death) is considered a *pati-vratrá sádhwí.*" *Vide* Coleb. Dig. Vol. III, (Lond. Ed.) p. 462.

But here '*pati-vratá*' (a faithful wife) means a *chaste* wife. "Faithful wife" does not here signify one who immolates herself on the funeral pile of her husband, for she cannot then inherit her husband's estate.—*Vi. Chi.* (*Sans.*) p. 152. See P. C. Tagore's English Translation, page 290.

A chaste woman *(pati-vratá)*] A virtuous woman or one that lives with her husband, associating with him in the performance of the rites ordained by the *Sruti* and *Smriti,* and observing fasting, and other religious ceremonies.—*Smri. Chan.* Chap. XI, Sect. i, Clause 12.

The term *nárí* (woman) means a wife of the rank of a *patní.* That she is such a wife is apparent from her being said to be the partaker of consecrated fire. To a wife competent to associate with her husband in the performance of religious rites, VRIHASPATI gives preference over the brother and like in point of performing the rites relating to the manes.—*Ibid.,* Cl. 13, 14.

(m) Base metals] Brass, lead, and the like.—*Smri. Chan.* Chap. XI, Sect. i, Cl. 20.

(n) With presents offered to the manes (*kavyam*)] With boiled rice offered in honor of departed ancestors.—*Ibid.*

(o) By pious liberality (*pūrtam*)] By presents, &c., made for the construction of wells, tanks, and the like.—*Ibid.*

Here by the mention of the *sráddhas* that a widow must perform, it is meant that she shall also perform the deceased's *sráddhas* prior to the *sapindí-karana,* and also celebrate obsequies annually, and take the estate of her lord. What has been said above is applicable to the estate of such husband as has been

separated from his co-heirs.—*Vi. Chi. Sans.* pp. 151, 152. See P. C. Tagore's Translation, page 290.

(p) The term "old men (*vriddah*)" signifies also learned men; for it is exhibited in the Dictionary of AMARA among the Synonyma of learned.—Coleb. Dig. Vol. III, (Lond. Ed.) p. 460.

(q) Females] The widows of her husband's sons and the rest. —*Ibid.*

Rule. The rule hence inculcated is, that a *patní* having taken the entire property of her husband inclusive of immovables, must, by presents to the relatives of her husband in proportion to the wealth (derived by her), perform acts (within the competence of a female to perform) calculated to obtain final happiness for her lord and herself.—*Vi. Mi. (Sans.,)* page 193.—*Vide Smri. Chan.* Chap. XI, Sect. i, Cl. 21.

Rule. Therefore, in the case contemplated by SANGRAHA-KÁRA, the only rule that can be recognised is that the qualifications described by VRIDDHA MANU* are all that are required in a female to entitle her to inherit the whole estate.—*Smri. Chan.* Chap. XI, Sect. i, Cl. 55.

Authority. VISHNU:—The wealth of him who leaves no male issue goes to his wife; on failure of her, to his daughter; if there be none, to the father; if he be dead, to the mother; on failure of her, to the brothers; after them, to the brothers' sons; if none exist, it passes to near kinsmen [*bandhus (r)*]; in their default to distant kinsmen [*sakulyas (s)*]; on failure of these, to the pupil; in his default, to the fellow-student in theology, for want of these, the property, excepting that of a Brahmin, escheats to the king.†

(r) By '*Bandhus*' is here meant *sapindas* or kinsmen allied by funeral oblations; and by '*sakulyas*,' persons from the same primitive stock (*sa-gotras*).—*Vi. Chi.* (*Sans.*) p. 151.

Here, by *Bandhus* is meant *sapindas*, and by '*sakulyas*' is meant persons of the same *gotra* or primitive stock; because if the term

* See *ante*, page 102.

† This text of VISHNU being in prose, is cited with some variations in the reading, and is not to be found in full in all of the books in which it is quoted. *Vide Vi. Mi.* (Sans.) p. 195;—*Vi. Chi.* p. 288;—*Mit.* In. Chap. IV, Sect. i, § 6;—*Smri. Chan.* Chap. XI, Sect. iv, Cl. 9.—*Vyav. Mayú.* Chap. iv, Sect. viii, § 14.

bandhus be taken here to mean the father's *bandhus*, and the rest, to be hereafter enumerated,* then there would be a deviation from the order of succession laid down by the prince of contemplative sages (YÁJNAVALKYA).† Vi. mi., 193.

In conclusion, it is to be understood, that the law allowing a *patní* to take the entire share of her husband, is applicable to the case of a parcener dying divided, and without re-union.—*Smri. Chan.* Chap. XI, Sect. i, Cl. 54. Conclusion.

"*Patní* (wife)" signifies a woman espoused in lawful wedlock; conformably with the etymology of the term as implying in a connection with religious rites.‡—*Mit.* In. Chap. II, § 5. *Patní* defined.

By the term '*Patní*' is meant a woman espoused in lawful wedlock, according to a rule of *Pánini.*—*Vir. Mi.* (*Sans*). page 193.

At present, however,—

83. A woman of the same class with her husband and espoused in lawful wedlock can alone be a *patní*, marriage with a damsel of an unequal class having been prohibited in the *kali* age.§ *Vyavasthá.*

Vrihat Náradíya Purána after citing "Undertaking sea voyages (to circumnavigate the ocean); the carrying of (*kamandalu* or) waterpot (by a householder); the marriage of twice-born men with damsels unequal in class:" adds, "The wise have declared, that these practices must be avoided in the *kali* age."—*Vide Coleb. Dig.* Vol. III. (Lond. Ed.) page 141. Authority.

The *Áditya purána* too, after citing "The filiation of any but the *dattaka* and *ourasa* is not admitted; and also Authority.

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* *Vide* Sect. IX. † See *ante*, page. 99.

‡ *Conformably with the etymology*] A rule of grammar contained in the *Pánini*.

According to AMARA's definition—*Patní* is a wife who is married in the legal form, who is (as it were) a second self (to the husband), and who is an associate in religious rites.

§ See the Chapter on Marriage.

the marriage of regenerate men with girls of unequal class," and other parts of law, proceeds—"These (practices) were, at the beginning of the *kali* age, judicially abrogated by wise legistators with an intent of securing mankind from evil. The ordinances of *Sádhus** are of equal authority with the *vedas.—Vide Coleb.* Dig. Vol. III, (Lond. Ed.) page 142.

The marriage of a *Shúdra* with a woman of another class has been prohibited by MANU himself, who says:—

"For a *Shúdra* is ordained a wife of his own class, and no other; all produced by her, shall have equal shares, though she have a hundred sons.—Chap. IX, *v.* 157.

Vyavasthá. **84.** According to the *Smriti-chandriká,* even of the wives of the same class, she who was married by being bought is not entitled to inherit from her husband, by reason of her not being a *patní*, and, as such, not being entitled to perform *sráddhas* and other religious rites and ceremonies.

Authority. The wife, '*patní*,' means a wife lawfully wedded in one of the approved forms of marriage, *Bráhma* or the like, capable of conferring on the wife a power to associate with her husband in the performance of religious sacrifices; it being also declared by *Pánini* that "the term '*patní*' (a wife), anomalously derived from '*pati*' (husband), is employed when connection with sacrifices (meaning religious rites) is indicated." The term '*Patní*' applies to a wife of no other kind. Hence a wife bought (as in *ásura* marriage &c.,) is not called "*patní*," there not being in her *that* connection with religious rites which is essential to a '*patní*.' Accordingly in another *Smriti*: "That woman who has been purchased for value paid is not styled a '*Patní*'; she associates neither in rites relating to deities, nor in rites relating to the *manes.* The learned call her a slave (*dási*)." When a wife is not a '*patní*' she is capable of conferring temporal benefits only. In order to show that a wife, not being a '*patní*' is incapable of conferring spiritual benefits,

* By *sádhus* is here meant the holy sages and legislators.

it is said that the learned call such a wife a slave or "*dási*." Hence, by the term "*patní*" being used in the text of VRIHASPATI above quoted, before the phrase "takes his share," it is shown that, to entitle a widow to inherit the estate of her husband, it is essential that she should have been capable to perform the rites relating to the *manes* and the like. *Smri. chan.* Chap. XI, Sect. i, Cl. 9-12.

PRAJÁPATI, therefore, points out, by the following passage, that, to such a *patní* alone, the right of inheritance attaches, as is capable of maintaining by her chastity the religious rites prescribed by both the scripture and the code of law. "Dying before her husband, a chaste woman [*nárí*] partakes of his consecrated fire [*agni-hotra*], or if her husband die [before her], she shares his wealth. This is a primeval law."—*Ibid.*, Cl. 13. See *ante* p. 104.

85. But according to the *Vír-mitrodoya*, a wife married as above is not entitled to inherit *only* in the case of there existing a wife married in one of the approved forms, whence it is inferred that according to that authority the former is entitled to inherit on failure of the latter. *Vyavasthá.*

The word *patní* being used, it appears that a wife married in the *ásura** or any other (disreputable) form is not entitled to inherit in the event of there existing another wife married in one of the approved forms. Thus a text of law:—"A woman who has been purchased for value paid is not styled a "*patní*": she associates (with her husband) neither in the rites relating to deities, nor in the rites relating to the *manes*. The Learned call her a slave (*dásí*)." Here calling her 'a slave' is to intimate that she is incapable of associating (with her husband) in the performance of religious rites, and not that she should be treated as a slave; since by being married (to her husband,) she cannot be another's wife. Therefore, by the expression "she associates neither in the rites relating to deities, nor in the rites relating to the *manes*," she is only prohibited from associating (with her husband in the performance of such *Authority.*

* When matrimony is contracted by giving property or paying money to the governor or guardian of the bride, it is called *ásura* marriage. See the Chapter on Marriage.

rites). Thus by the (use of the) term '*patní*' it is intimated that to entitle her to inherit (from her husband) it is essential that she should have been capable of performing the rites relating to the *manes* and the rest. Accordingly PRAJÁPATI, (by the following text,) points out that the wife who is capable of associating (with her husband) in the performance of the rites prescribed in the *Veda* and *Smriti*, and who is *pati-vratá*, is alone entitled to inherit the estate (of her husband):—" Dying before her husband, a chaste (*pati-vratá*) woman partakes of his consecrated fire (*agni-hotra*), or if her husband dies (before her), she shares his wealth."*—*Vi. Mi. (Sans.,)* p. 193.

The right of a widow [*patní*] to inherit arises only where the husband dies divided in estate.† Accordingly VRIHASPATI:—"Whatever property a man possesses of every kind after division, whether mortgaged or other, the wife [*Jáyá*] shall take after the death of her husband, with the exception of fixed property."(*s*)—*Smri. Chan.* Chap. XI, Sect. i, Clause 23.

The purport of the text is, whatever is the property of a deceased husband, whether consisting of movables or immovables, whether pledged or otherwise, the widow alone takes, where the husband was a divided member of the family.—*Ibid.* Cl. 24.

The word '*Jáyá*', used in the above text of VRIHASPATI, means a wife who is a '*patní*.'—*Ibid.* Cl. 25.

(*s*) With the exception of fixed property] This exception is applicable to a *patní* who has not even a daughter, for, if it were to be held applicable to every widow generally, the passage would be inconsistent with that of PRAJÁPATI: "Having taken his movable and *immovable* property, the precious and base metals, the grains, liquids, and the clothes, &c."*—*Ibid.* Clause 25.

The inconsistency *cannot* be attempted to be removed by saying that the text of VRIHASPATI is applicable to a case

* *Ante* pages 104, 105.

† From its being laid down that a widow becomes entitled to succeed where the husband *dies divided*, it is understood that where the husband dies *undivided*, his father, brother, or the like, who lived in union with him takes the property of the issueless man.—*Smri. Chan.* Chap. XI, Sect. i, Clause. 25.

where the husband dies undivided, or where the widow does not lead a virtuous life.—*Smri. Chan.* Chap. XI, Sect. i, Clause 26.

To prevent any such construction being put upon the passage, the same author [VRIHASPATI] has stated:—"Even if virtuous, and if partition have been made, a woman is not fit to enjoy real property." The object of this passage is to explain that real property being the means of subsistence among the descendants of a Hindú family, is inheritable only by a widow that has got issue, and that therefore a widow [*patní*] having no issue, has no title to inherit the property although she may be virtuous and the family divided.—*Ibid.*, Cl. 27. Consequently,

According to the *Smriti-chandriká*—

86. The widow who has no daughter cannot inherit the immovable property of her husband, notwithstanding that she be virtuous and the property divided, but *she* alone who has a daughter inherits immovable as well as movable property. *Vyavasthá.*

As for this text of VRIHASPATI: "Whatever property a man possesses, of every kind, after division, whether mortgaged, or other, that the wife, [in whatever form married, *jáyá*] shall enjoy after the death of her husband, with the exception of fixed property. Even if virtuous and if partition have been made, a woman is not fit to enjoy real property" it, according to the *Smriti-chandriká*, refers to a wife who has not [even] a daughter, for a woman having *Further Authority.*

Annotations.

86. According to the doctrine of the *Smriti-Chandriká*, which is of great and paramount authority in the south of India, a widow, being the mother of daughters, takes her husband's property both movable and immovable, where the family is divided; but a childless widow takes only the movable property. Where there are two widows one the mother of daughters and the other childless, the former alone takes the immovable estate, and the movable property is equally divided between them.—*Macn.* H. L. Vol. I, p. 21.

a daughter obtains the fixed property also. MÁDHAVA, again, considers it to relate to the prohibition of sale, or other transfer of real property, by a widow, without the concurrence of the heirs.—*Vyav. Mayú.* Chap. IV, Sect. viii, § 3.

The author of the *Víra-mitrodoya*, however, disapproves of the above doctrine of the *Smriti-chandriká* by saying that as the doctrine in question is not laid down in the *Madana-ratna*, *Mitákshará*, *Kalpa-taru*, and (in the book of) *Haláyudha* and all other books, the same must be a groundless one.—*Vide Ví. Mi.* (*Sana.*) p. 193.

Passages, adverse to the widow's claim, likewise occur. Thus NÁRADA has stated the succession of brothers, though a wife be living; and has directed the assignment of a maintenance only to widows.—"Among brothers, if any one die without issue, or enter a religious order, let the rest of the brethren divide his wealth, except the wife's separate property. Let them allow a maintenance to his women for life, provided these preserve unsullied the bed of their lord. But, if they behave otherwise, the brethren may resume that allowance." MANU propounds the succession of the father, or of the brother, to the estate of one who has no male offspring: "Of him, who leaves no son, the father shall take the inheritance, or the brothers." He likewise states the mother's right to the succession, as well as the paternal grand-mother's: "Of a son dying childless, the mother shall take the estate, and, the mother also being dead, the father's mother shall take the heritage." SANKHA also declares the successive right of brothers, and of both parents, and lastly of the eldest wife: "The wealth of a man, who departs for heaven, leaving no male issue, goes to his brothers. If there be none, his father and mother take it: or his eldest wife." KÁTYÁYANA too says, "If a man die separate from his coheirs, let his father take the property on failure of male issue; or successively the brother, or the mother, or the father's mother."—*Mit.* In. Chap. II, Sect. i, § 7.

But VIJNÁNESWARA, the author of the *Mitákshará*, after fully discussing the matter set forth in the passages that are adverse to a widow's claim, has laid down as follows:—

"*Therefore, it is a settled rule, that a wedded wife, being chaste, takes the whole estate of a man, who being separated from his co-heirs and not subsequently re-united with them, dies leaving no male issue.*"—*Mit.* In. Chap. II, Sect. ii, paragraph, 39. Settled rule.

The above is followed and adopted, though not exactly in the same words, in all the Digests of the Benares and other schools.

Thus the *Víra-mitrodaya*:—"It is a settled rule that the widow of a man who was separated from his co-heirs and not subsequently re-united with them, inherits his estate in default of heirs down to the great-grandson in the male line."—*Ví. mi.* (Sans.) p. 199. Settled rule.

So the *Viváda-chintámani*:—"The conclusion is that, on failure of (heirs), down to the great-grandson of her husband, the chaste wife is entitled to inherit his estate. What is said above, is applicable to the case of a husband who has taken his share from his co-heirs."—*Vi. Ch.* (*Sans.*) page 152. See *P. C. Tagore's Translation* pp. 290, 291. Conclusion.

So also the *Smriti-chandriká*:—"In conclusion it is to be understood, that the law, allowing a *patní* to take the entire share of her husband, is applicable to the case of a parcener dying divided and without re-union."—*Smri. Chan.* Chap. XI, Sect. I, Cl. 54. Conclusion.

87. A widow being entitled to inherit the divided share or property of her late husband, it has been, by parity of reasoning, determined that, she is entitled to inherit also such property as was separately acquired or held by him, or what was vested in him, though the enjoyment thereof was postponed till after a contingency.* *Vyavasthá.*

Because such property not being held in common with any one else, is of the nature of a divided property. Reason.

* *Vide* Precedents, pp. 244—251, 443.

Vyavasthá. **88. The term "chaste or virtuous," and the expression "keeping unsullied the husband's bed" &c.* being used, as a qualification of the widow entitled to inherit, it follows that an unchaste woman is not entitled either to take inheritance or to have maintenance.†**

Reason. Inasmuch as she is incompetent to perform the rites relative to deities and *manes*; and even if she do perform them, the performance of such acts by her is vain and fruitless. Thus—

Authority. VYÁSA:—*O Arundhati!* gifts, fastings, religious rites, and good acts of unchaste women are vain; their religious merits also, O, spotless beauty, are fruitless.‡—*v.* 734 of Chapter 137 called the *Parijáta-harana* of the book entitled the *Hari-bansa* in the *Mahá-bhárata.*

Authority. A wife, if faithful to her husband, takes his wealth; not if she be unfaithful.—*Vyav. Mayú.* Chap. IV, Sect. viii, § 2.

Authority. KÁTYÁYANA:—Let the widow succeed to her husband's wealth, provided she be chaste.—*Vyav. Mayú.* Chap. IV, Sect. viii, § 2;—*Mit.* In. Chap. II, Sect. ii, § 2.

Authority. KÁTYÁYANA:—A widow who does malicious or injurious acts (*a*), who has no sense of shame, who squanders away money, and who is bent upon committing adultery, is held unworthy of wealth [*dhana (b)*]§.—*Smri. Chan.* Chap. XI, Sect. i, Cl. 47.

(b) Wealth *(dhana)* means wealth or a share of land assigned for maintenance, &c.—*Ibid.*

The meaning is, that a widow, subject to any of the four vices above described, is not entitled to enjoy the mainte-

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* *Ante* pages 102, 105, 107, 115. † *Vide* Precedents, pp. 251—258, 402, 403.

‡ *Vide* B. L. R. Vol. V. p. 369.

§ The translation of the above text as contained in the *Vyavahára Mayúkha*, and *Viváda-chintámani*, differs in some respects from the above, and slightly from each other. See *Vyav. Mayú.* Chap. IV. Sect. VIII § 8, and *Vi. Chi.* p. 265.

nance so allotted. The term "*dhana* (wealth)" used in the text, refers also to food and raiment.—*Ibid.*

(*a*) Who does malicious or injurious, acts, &c.] This shows that the kindred should demand the peculiar property from such a woman.—*Vi. Chi.* p. 366.

NÁRADA:—Let them (i. e. brothers) allow a maintenance to his (the deceased brother's) women for life, provided these preserve unsullied the bed of their lord. But, if they behave otherwise (*c*), the brethren may resume that allowance.* **Authority.**

(*c*) If they behave otherwise.] If they pursue an incontinent course.—*Smri. Chan.* Chap. XI, Sect. i, Cl. 48.

YÁJNÁVALKYA:—Their childless wives who preserve chastity must be supplied with food and apparel; but disloyal and traitorous (*d*) wives shall be banished from the habitation.—Coleb. Dig. Vol. III, (Lon. Ed.) p. 324. **Authority.**

(*d*) Traitorous wives] This term, according to the *Ratnákara*, positively denotes treason, such as the attempt to administer poison or the like, not merely a contentious spirit. Consequently the same married wife who ought to be banished from the habitation by her husband, shall, in like manner, be expelled by his brothers and the rest.—*Ibid.*

For other authorities on the above point see the Chapter on "Exclusion from Inheritance."

PRAJÁPATI, therefore, points out, by the following passage, that, to such a *patní* alone, the right of inheritance attaches, as is capable of maintaining by her chastity the religious rites prescribed by both the Scripture and the code of law. "Dying before her husband, a chaste woman [*nárí*] partakes of his consecrated fire [*agni-hotra*], or if her husband die [before her], she shares his wealth. This is a primeval law."—*Smri. Chan.* Clause 12. **Authority.**

By the word "*Agni-hotra*" used in the text, is meant the fire belonging to the consecrated hearth.—*Smri. Chan.* Chap. XI. Sect. i, Clause 12.

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* *Mit. In.* Chap. II, Sect. i, § 7;—*Smri. Chan.* Chap. XI, Sect. i, Clause 48;—*Vyav. Mayú.* Chap IV, Sect. viii, § 6.

Vyavasthá. **89. A widowed woman suspected of incontinence is not also entitled to take inheritance, but is to have a maintenance.**

Authority. "If a woman, becoming a widow in her youth, be headstrong, a maintenance must in that case be given to her for the support of life." This passage of HÁRITA is intended for a denial of the right of a widow suspected of incontinency, to take the whole estate. From this very passage [of HÁRITA], it appears that a widow, not suspected of misconduct, has a right to take the whole property.—*Mit.* In. Chap. II, Sect. i. § 37.

With the same view, SANKHA has said "Or his eldest wife." Being eldest by good qualities, and not supposed likely to be guilty of incontinency, she takes the whole wealth; and, like a mother, maintains any other headstrong wife [of her husband.] Thus all is unexceptionable.—*Ib.* § 83. So also *Mitra Misra.* See *Vi. Mi.* (*Sans.*) p. 198.

Authority. Where a widow is suspected of incontinency the mode prescribed by HÁRITA is to be adopted even where the widow is of the rank of a *patní* and belongs to a divided family. "If a woman becoming a widow in her youth, be headstrong, a maintenance must, in that case, be given to her for the support of life." Headstrong] cruel, obstinate, and one against whom there is a balance of presumption of incontinence.—*Smri. Chan.* Chap. XI, S. i, Cl. 50.

Authority. Even a mere maintenance is for a woman suspected of incontinence, from this text of HÁRÍTA. "If a woman, becoming a widow in her youth, be headstrong [suspected of incontinence (*d*)], a maintenance must, in that case, be given to her for the support of life."—*Vyav. Mayú.* Chap. IV, Sect. viii, § 9.

(*d*) Headstrong, according to the *Mitákshará* means suspected of incontinence.—*Ibid.*

This establishes our argument (The wife, if faithful &c.") that a lawfully married wife, restrained (in her conduct) takes the wealth.—*Vyav. Mayú.* Chap. IV, Sect. viii, § 9.

90. **The widow, as heir to her husband, inherits only such property as belonged to, or was vested in, him, or as he was entitled to, though not possessed of; but not such property as would have devolved on him had he outlived its owner.*** *Vyavasthá.*

91. **Where there are two or more widows free from any disqualifying defect, they inherit their husband's property equally and simultaneously, and even if they choose, may divide it equally among themselves.†** *Vyavasthá.*

But if there be more than one (wife), they will divide it and take shares.—*Vyav. Mayú.* Chap. IV, Sect. viii, § 9. Authority.

The singular number is used to denote the class or caste, so if a man leave several wives, of the same caste with, or of a different caste from, him, then all of them divide and take their husband's estate in due proportions.—*Vi. Mi.* (*Sans.*) p. 193. Authority.

So also the *Mitákshará* which says:—"The singular number is used to denote caste or class, so if there be several Authority.

Annotations.

91. If there be more than one widow, their rights are equal.—*Macn. H. L.*, Vol. I, p. 19.

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* See Precedents, pp. 242—251. † See Precedents, pp. 255—259, 278, 403.

See also *In the Goods of Dadoo Mania*, 1st September 1862, Ind. Jur. October 25th, 1862, page 59, before the High Court of Bombay where Arnould, J., said: "This doctrine has been followed by the late Supreme Court, in a case of the goods of Chapa Judoo, decided on the 22nd of June 1861, of which we have been furnished with a note by the Chief Justice, where the Court, after consideration, and obtaining answer from the *Shástris* of the Sadr Adawlut and at Poona, held that, 'if there be more than one widow, each of them is entitled to an equal share of the property.' It appears from those answers that, although the author of the *Mayúkha* cites no text in support of his opinion, such texts are to be met with in the *Víra-mitrodaya*, an authority of the Benares School, and Macnaghten's Principles of Hindu Law, a work of authority in Bengal. It is also said, page 19, that if there be more than one widow, their rights are equal. The case in Morton's Reports, page 314, handed up to us yesterday by Mr. Westropp, shews that this rule was acted upon by the Supreme Court in Calcutta as early as the year 1791, and in Morley's Digest (N. S.) Vol. i, p. 180, [para. 15] we find an instance of its being acted upon in the North-Western Provinces

wives of the same caste, and of different castes, they divide and take the wealth in due proportions.—*Mit. Sans.* p. 207.

The original of the above passage has been omitted in Colebrooke's translation between Paras. 5 and 6, Chap. II, Sect. i.

Vyavasthá. **92. At present, however, only the wedded wives of the same class with their husband are *Patnís*;—so if there be several such widows, they equally divide and take the heritage of their husband.**

Authority. Where there are several widows (*patnís*), it is proper that they should all take the inheritance of their sonless husband by dividing the same in equal shares among them.—*Smri. Chan.* Chap. XI, Sect. i, Cl. 57.

Vyavasthá. **93. Upon the death of any of the several widows who inherited the estate of their husband, the portion inherited by the deceased widow devolves on the**

Annotations.

91-93. If there be more than one widow, their rights are equal; the right is considered as vested only in one individual, so that the property does not go to the heirs of the husband until after death of *all* the widows.—Elb. In. Sect. 163.

in 1850. On these authorities, we hold that the widows in this case are *primâ facie* entitled to equal shares of the property." In Bengal, two widows take the whole estate for life, and on the death of one, the whole survives to the other, upon whose death, it goes to the collateral heirs of the husband.—I Morl. Dig. 313. In Madras, it has been held, that the eldest widow succeeds; the other widows being entitled during her life to maintenance only, the second widow succeeding on the death of the first.—I. M. Sel. Dec. 456, 457, and R. A. No. 1 of 1835. II, Ibid, 44. But see Strange's Manual H. L. 2nd Ed. page 326, where the author lays down that, in Southern India, the wives are viewed as on an equality and inherit equally; and considers the following passage from the *Mitákshará*:—"The singular number 'wife' signifies the kind; hence, if there are several wives belonging to the same or different classes, (they) divide the property according to the shares prescribed to them and take it." This passage appears in the *Sanskrit* copy of the *Mitákshará* in my possession, but has been omitted in Colebrooke's translation. This passage occurs between paras. 5 and 6 Sec. i, Chap. ii. of the Mitákshará." *Smri Chan,* Note p. 165. See also *Vyar. Mayú* Stokes' Ed. p. 52 where the above note is inserted by the learned Editor.

surviving widow or widows who inherited jointly, and not on the daughter and other inferior heirs of the husband, so long as any of his widows be in existence.*

Because, according to the subjoined text of YÁJNAVALKYA —" The wife and the daughters also, both parents, brothers likewise, and their sons, gentiles, cognates, a pupil, and a fellow student: on failure of the first among these, the next in order is indeed heir to the estate of one, who departed **Reason.**

Annotations.

93. Another case in point is that of a man dying survived by three widows, who take his property and divide it among themselves, each taking a third. On the death of one of them, who is entitled to succeed to her property, the other widows, or the heirs male of her husband? The law is silent as to this point also. It is true that the law ordains the succession of the husband's heirs after the widow; but this rule does not contemplate the existence of other widows, and the weight of it is counter-balanced by another, which prescribes that the widow shall take the entire property, to the exclusion of the heirs of the husband; and, consequently, on the death of the first widow, the second and third take the share of which she died possessed, and, on the death of the second, the entire property will devolve on the third; nor have the husband's heirs any legal claim until after her death. This proceeds upon the principle above mentioned, that all the three widows of the same man are held to be, in a legal point of view, one and the same individual. Macn. H. L. Pref., pp. XII, XIII.

93. It may be here observed, that if a man die leaving more than one widow, (three widows, for instance,) the property is considered as vesting in only one individual, thus, on the death of one or two of the widows, the survivor or survivors take the property, and no part vests in the other heirs of the husband until after the death of all the widows.—Macn. H. L. Vol. I, pp. 20, 21.

* *Vide* Precedents, pp. 259, 278, 403. † See ante page 99.

for heaven leaving no son: this rule extends to all (persons and) classes." The widow being the *first* of the heirs enumerated therein, and it being ordained also that *on failure of the first among these, the next is heir,*' none of the heirs posterior or inferior to the widow, namely, the daughters and the rest, can succeed when there is no failure of the widow, that is while a widow is in existence; also because, according to the following text of VRIHASPATI:— "Where there are many relatives in the agnatic line, remote kindred, and cognate kindred, he of them, who is nearest of kin, shall take the property of him who dies without male issue,"*—the widow of a man, who dies without male issue down to the great-grandson (in the male line). being the nearest of his relatives, is alone entitled to succeed to his estate to the exclusion of all other heirs left by him; and because it being ordained in the text of KÁTYÁYANA (to be presently cited†,) that after a widow, her husband's heirs (that is the nearest heirs,) succeed to the estate left by him and vacated by her, the surviving co-widow of the deceased, being the first and foremost of all the surviving heirs of the husband must succeed also to that portion of the husband's estate which was inherited and left by the deceased widow of her husband.

Vyavasthá. **94. The widow inheriting the estate of her husband is only entitled to enjoy it: she is not competent to make a gift, mortgage or sale thereof.‡**

Authority. VRIHASPATI:—After the death of the husband; the widow, preserving the family (*e*) shall obtain the share of

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Annotations.

94. So far, as to the right of succession, the law is clear and indisputable, but to what she succeeds is not so apparent. She has not an absolute proprietary right, neither can she, in strictness, be called even a tenant for life: for the law provides her successors, and res-

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* *Vide* Coleb. Dig. Vol. III, (Lon. Ed.) p. 532.

† See page 123.

‡ *Vide* Precedents, pp 240, 260—268, 277—279, 404—408, 410, 411.

her husband, but so long as she lives; she has not the property (therein,) in making a gift, mortgage, or sale.—*Smri. Chan.* Chap. XI, Sect. i, Cl. 28;—*Vyav. Mayu.* Chap. IV, Sect. § 4.—*Vi. Mi. Sans.* p. 194.

(e) Preserving the family] Preserving the honor of the line: in other words, being virtuous.—*Smri. Chan.* Chap. XI, Sect i, Clause 28.

KÁTYÁYANA:—Let the sonless widow preserving unsullied the bed of her lord and abiding with her vernerable protector [*Guru (f)*], enjoy with moderation [*kshántá (g)*] the property until her death. After her, let the heirs *(h)* take it.—*Smri. Chan.* Chap. XI, Sect. i, Cl. 32.—*Vi. mi.* (Sans.) p. 194. Authority.

(f) Abiding with her venerable protector] staying with her father-in-law and the rest, let her only enjoy the husband's estate and not make a gift, mortgage or sale of it at her pleasure as she can do of her separate property.—*Vi. Mi.* (*Sans.*) p. 194.

(g) With moderation] Patient of the control which the relations of her deceased husband may exercise over her in the disposal of wealth.—*Smri Chan.* Chap. XI, Sect. i, Cl. 32.

With moderation] Without much expenditure.—*Vi. chi.* p. 162.

With moderation] Not prodigally expensive, but enjoying the estate with frugality: such is the exposition of the commentators. The meaning is that she may use it to support life, but not to wear delicate apparel or the like.—*Vide* Coleb. Dig. Vol. III, (Lon. Ed.) pp. 471, 472.

(h) After her, the heirs (namely) daughters and the rest, entitled to inherit that property, will take the same, not the agnates,

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Annotations.

tricts her use of the property to very narrow limits. She cannot dispose of the smallest part, except for necessary purposes, and certain other objects particularly specified. It follows, then, that she can be considered in no other light than as a holder in trust for certain uses; so much so, that should she make waste, they who have the reversionary interest have clearly a right to restrain her from so doing.—Macn. H. L. Vol. I, pp. 19—20.

they being posterior or inferior to daughters and the rest, not also the persons entitled to the *Strí-dhan*; since the succession of the heirs entitled to the *Strí-dhan* has been stated in other texts by KÁTYÁYANA. Therefore, according to the text—"The wife, daughters also, &c."* whoever next on failure of the first have been fixed to be the successors to the property of a sonless man who died after being separated from his coparceners and not subsequently reunited with them, they will take also upon the widow's death the property (of her husband) remaining after her enjoyment, in the same manner as they would have taken if the widow had not inherited. At that time the daughter and the rest would confer greater spiritual benefits on the deceased than others.—*Vi. Mi.* (sans.) p. 194.

"After the widow, her husband's heirs will take the property remaining after her enjoyment."—From this it must be concluded that the succession of the husband's heirs can take place only in the case of their being alive at the time of the widow's death. Consequently,—

Vyavasthá. **95. Only those nearest relations of the husband who survive his widow are entitled to inherit his property after her demise, and not those who survived him but died during the life of the widow.†**

Illustration. It must therefore be understood, that if any of the husband's nearest relatives after surviving him dies before his widow, and the rest survive her, then those who survived the widow will, at her death, inherit her husband's property vacated by her, not also the heirs of the relative who survived the husband but predeceased the widow, because they are not equal in degree to the said survivors, but their deceased ancestor was, who would have succeeded together with the said survivors, had he lived at the time of the widow's death, when the succession opened out; or, in other words, upon the widow's death, those relatives only succeed as reversionary heirs who would have been the heirs of the husband if *he* had died at *that* time.‡

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* *Ante* page 99.

† *Vide* Precedents, pp 240, 260—268, 277, 278, 288, 362, 364.

‡ *Vide* Nubeen Chunder Chukerbutty *v.* Issur Chunder Chukerbutty and others.—S. W. R. Vol. IX. F. B. p. 505.

For instance, if a sonless man dies leaving three brothers and a widow, and one of these brothers dies leaving a son during the life-time of the widow, and the other two brothers survive the widow, then the two surviving brothers will succeed to their late brother's estate inherited and vacated by his widow and not also the son of the brother who died in the interim, that is after the death of the late proprietor and before that of his widow,—inasmuch as the brothers are nearer than the brother's son, and entitled in preference to him. Example.

Although in conformity with KÁTYÁYANA'S dictum: "abiding with her venerable protector,"* and with this of LIKHITA: "After receiving (property) she must reside with the family of her husband,"†—it is incumbent on a widow to reside with the family of her husband, yet,—

96. If it be difficult for a widow to stay in the family of her husband, because of cruelty or other just cause, she may betake herself to the family of her father and the rest, provided that her change of residence be not for unchaste purposes.‡ *Vyavasthá.*

VRIHASPATI:—A decision must not be made solely by having recourse to the letter of written codes, since, if no Authority.

Annotations.

96. It was probably never in the contemplation of the legislator that the widow should live apart from, and out of the personal control of, her husband's relations, or possess the ability to expend more than they might deem right and proper.—Macn. H. L. Vol. I, p. 20.

A widow is to reside in her husband's family, yet as she forfeits her right to the property only by not remaining chaste, or by making waste, the mere residing with her own family cannot cause a forfeiture of her right to the enjoyment of the property, if it is not done for unchaste purposes.—Elle. In. Sect. 167.

* *Ante* page 23. † *Viváda-chintámani*, page 265.
‡ *Vide* Precedents 258, 589, &c.

decision were made according to the reason of the law, there might be a failure of justice.—*Vyab. Mayú.* (Sans.) page 7, see *ante* p. 57.

Vyavasthá.

97. But, when afflicted with disease and in danger of her life, her removal to the family of her own kindred has been prescribed by law itself.

Authority.

This is a law (*dharma*) of LIKHITA :—"after receiving (property) she must reside with the family of her husband; yet afflicted by disease, and in danger of her life, she may go to her *own* kindred."—*Vi. Chi.* p. 265.

Vyavasthá.

98. The law as current in the Benares school, having made no distinction between the movable and immovable estate inherited by a widow, she is equally prohibited from making any unlawful alienation of either, inasmuch as by means of both descriptions of property spiritual benefits are procurable for the late owner.*

The Vivádá-chintamáni and most of the other law tracts of the *Mithilá* school, however, hold that as a woman has absolute power over the movable part of the *strí-dhan* given by her husband, so, by parity of reasoning, she has absolute power over the movable property *inherited* by her from her husband, but not over the immovable property whether inherited or received as *strí-dhan* from her husband.

Thus the *Vivâda-chintámani* :—"NARADA says : 'Property given to her by her husband through pure affection she may enjoy at her pleasure after his death, or give away, with the exception of land or houses." Consequently a woman can dispose of movable property which has been given her by her husband, but she can never dispose of immovable property. The same rule holds good in the case of *saudáyika*, or the gifts of affectionate kindred."

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* *Vide* Precedents 278, &c.

"KÁTYÁYANA says: 'A woman, on the death of her husband, may enjoy his estate according to her pleasure; but in his lifetime she should carefully preserve it. If he leave no estate, let her remain with his family'"

"A childless widow, preserving her chastity, shall enjoy her husband's property with moderation, as long as she lives. After her death, the heirs shall take it."

"This admits of two meanings.—The one is that, on the death of the husband, his property devolves on his wife, and becomes her own in default of other heirs. The other is that the property, which she enjoys with the consent of her husband in his lifetime, is to be regarded as her peculiar property. KÁTYÁYNA says as to the first of these:—'Let a woman on the death of her husband enjoy her husband's property at her discretion.'"

"This refers to property other than immovable."

"The following provision is made for immovable property. Let a woman enjoy it with moderation as long as she lives. After her death, let the heirs take it."

"*Moderation*—means without much expenditure."

"*Childless widow*—means one who has no heir of her own."

"On the second, it is said that 'while he lives she should carefully preserve it,' or in other words, the property shall be protected in the lifetime of the husband. If her husband have left no wealth, the widow should live with his family."

"Hence the immovable property, which a woman gets after the death of her husband, cannot be disposed of at her pleasure."

"The meaning of this is consonant with that of the husband's donation (which can only be enjoyed but not spent.)"

"The texts of KÁTYÁYANA do not refer to the peculiar property of woman. The inconsistency owing to this is removed by the similarity of meaning."

"As a woman cannot make a present of, or at pleasure dispose of, immovable property, given to her by her husband in his lifetime, so she cannot dispose of any immovable property which she inherits on his death."

"The same opinion is maintained in the *Ratnákara* and the *Prakásha-kára.*"

"If the mother, on the death of her son, get his immovable property, she cannot make a gift of it, or dispose of it at her pleasure."—*Vi. chi.* p. 261. Consequently—

According to the *Mithilá* school—

Vyavasthá. **99. A widow may at pleasure make a gift or other disposition of the movable property inherited by her from her husband, but as respects the immovable property so inherited, she can only enjoy it with moderation until her death, after which her husband's heirs shall take it,—she having no power to alienate the same except under a legal necessity, or for purposes warranted by law.†**

Vyavasthá. **100. It has also been determined by the Courts of Justice in Madras and Bombay that a widow may, at pleasure, make a gift or other disposition of the movable property inherited by her from her husband; but she is not competent to alienate immovable property except under a legal necessity or for purposes warranted by law, or with the consent of the reversionary heirs.‡**

According to the *Mádhavya,*—a widow who succeeds to her husband's estate, is restricted from alienating the immovables, without the consent of his heirs, but there does not appear to be any restriction on her power, as affecting movables. *Vide* Precedents, pp. 410, 411.

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† *Vide* Precedents, pp. 272, 273. ‡ *Vide* Precedents, pp. 273—277.

"What was given to a woman by the father, the mother, the husband or a brother, or received by her at the nuptial fire, or presented to her on her husband's marriage to another wife, and also *any other* (separate acquisition,) is denominated a woman's property." The term "and also *any other*" contained in the above text of YÁJNAVALKYA is thus interpreted by VIJNÁNESHWARA: "and also property which she may have acquired by inheritance, purchase, partition, seizure or finding, are denominated by MANU and the rest "woman's property."* The term 'woman's property' conforms, in its import, with its etymology, and is not technical: for if the literal sense be admissible, a technical acceptation is improper."—*Mit.* Chap. II, Sect. XI, § 1—3.

Although at first sight it may appear from the above interpretation that even inheritance acquired by a woman becomes her *strí-dhan,* yet in reality it is not so: inasmuch as from VIJÁNESHWARA's own *dicta*—"if the literal sense be admissible, a technical acceptation is improper," it is clear that he has said so by reason of his having adopted the literal or etymological sense of the compound term *strí-dhanam,* which is formed of, or when separately used was, *striyáh* (woman's,) and *dhanam* (property). Now as the property which a woman acquires by inheritance is also *that striyáh dhanam* or *that* woman's property,† the author, by the expression "and also property which a woman may have acquired by inheritance," &c., appears to have meant only to say that the term '*strí-dhanam,*' in its literal sense, comprehends also the property which a woman may have acquired by inheritance, &c.; because if such property could be expressed by the separate words '*striyáh dhanam*' or woman's property, it could also be expressed by the same words in their compounded form, '*strí-dhanam,*' and not because such property being ex- Remarks.

* It cannot, however, be found in the Institutes of MANU that property which a woman acquires by *inheritance,* becomes *strí-dhan* or woman's peculium, since it is only stated therein that—'what was given before the nuptial fire, what was given on the bridal procession, what was given in token of love, and what was received from a brother, mother, or a father, are considered as the sixfold *separate* property of a married woman.' Chap. IX, v. 194. KÁTYÁYANA and the other Legislators also have not laid down that the property which a woman may have acquired by inheritance, and the like, classes as her *strí-dhan* (woman's peculium).

† See precedents, pp. 260, 342, 383.

pressed by the term '*strí-dhanam,*' must be included in, and form part of, the real *strí-dhanam* or woman's peculium (over which a woman has absolute power in every respect,) and be dealt with as such. This is clear from the subjoined passage contained in another part of his work. "As to the text ordaining independence,—'a woman is never fit for independence,' let independence be (as it is) what is the harm in admitting the (woman's inherited) property (to be the woman's property)?"* The author would never have said so if a woman had absolute power over her inherited property just as she has over her real *strí-dhan.* Furthermore, he has laid down the order of succession to a woman's inherited property, in conformity with YÁJNAVALKYA's text, "The wife, and daughters also, &c.,"† while with respect to a woman's peculium (real *strí-dhan*) he has laid down another order of succession which is quite different from the former.‡ From all these it is quite clear—that the author of the *Mitákshará* has called a woman's inherited property '*strí-dhanam*' solely because the term in its etymological sense comprehended *any* property *any* how acquired by a woman; that according to the *Mitákshará* she has no absolute power over such (*i. e.* inherited) property (as she has over her peculium,) but is always under the control of the former owner's reversionary heirs with respect to its use, disposition, and so forth§; and that such property, upon her death, devolves on the reversionary heirs of the former owner, in the order as laid down by himself, in conformity with the text of YÁJNYAVALKYA.||

That such is the doctrine of the *Mitákshará* and also the law on the subject, will appear from the following passages of the *Víra-mitradoya,* which is justly held to be an exposition of the *Mitákshará.*

"Living in the family of her father-in-law and the rest, she (the widow) will enjoy her husband's estate, she must not, at pleasure, make a gift, mortgage, sale or other disposition thereof like her *strí-dhan* or peculium: after her, the heirs (of her husband,) *viz.,*—

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* *Mitákshará* Page 112 Sanskrit. † *Ante* page 99.

‡ See the Chapter on *Strí-dhan.*

§ See *Vyavasthás* 94—102 and the authorities, &c., relative thereto.

|| See *ante* pp. 99 *et seq.*

daughters and the rest, who are entitled to that property, shall take the same, not the agnates, for they are inferior or posterior to the daughters, not also those who are entitled to the *strí-dhan,* for the right of the persons entitled to the *strí-dhan* has been treated of by KÁTYÁYANA in other texts. Consequently, according to the text—'The widow, and daughters also,*' &c., those who on failure of the former have been fixed to be the successors to the property of a sonless man who died after being separated from, and not subsequently reunited with, his co-parceners, will take after the widow's succession and death, the property remaining after her enjoyment just as they would have taken if it had not been inherited by her. At that time the daughters and the rest confer on the deceased (husband) more spiritual benefits than others."—*Vi. Mi.* (Sans.) p. 194.

In truth, upon the death of the husband in whom the property had vested, it is proper that his next of kin take his property.—*Ibid.* p. 195.

The above is the doctrine of the Benares and all other schools, and followed in practice. *Vide* Precedents, pp. 275, 278, 288, 383, 452, 463, 466, 467, 469.

101. The fact of a woman's having recovered her husband's property by litigation gives her no unrestrained power over it, inasmuch as such property also is held to be the heritage of her husband, and as such it can only be enjoyed by her with moderation till her death, after which the same would devolve on the reversionary heirs of her husband.† *Vyavasthá.*

It has been determined that—

102. As a widow is incompetent to alienate, at pleasure, the heritage of her husband, so is she in- *Vyavasthá.*

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102—104. With respect not only to what she may have inherited from her husband, but to its accumulated savings also, her duty is to

* *Ante,* page 99.

† *Vide* Precedents, pp. 278, 268, 269, 406, 407.

competent to alienate, at pleasure, the accumulated savings of the income, or the property acquired by her with the income, of that heritage.*

However,—

Vyavasthá. **103.** The widow's incompetency to alienate the heritage of her husband refers only to her *making waste*, and *not* to alienations under legal necessities, for benefiting the estate, or for religious and charitable purposes to secure spiritual welfare.

Therefore,—

Vyavasthá. **104.** A widow is competent to give, mortgage or sell her husband's property for such secular purposes as are legally necessary,—(*viz.*,) for her own

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regard herself as little more than tenant for life, and trustee for the next heirs, of property so possessed ; being (as already intimated) restricted from alienating it, by her sole independent act, unless for necessary subsistence, or purposes beneficial to the deceased. Str. H. L. Vol. I, (2nd Ed.) p. 246.

103. The enjoyment of the property is given her (the widow) upon two conditions : 1. that she remain chaste, 2. that she does not make waste.—Elb. In. Sect. 164.

103, 104. The widow is in her right as wife *entitled* to enjoy the property of her deceased husband, and as heir *bound* to apply it for his spiritual benefit. Generally, she cannot make gifts, or sell or mortgage the property, because after her death the property is to go to the next heir of her husband, but when a sale or mortgage becomes necessary for any indispensable duty, religious or secular, or for her maintenance, it is valid, because duties *must* be performed, and she has a right to her maintenance from the property ; and whenever gifts are made, or the property is sold or mortgaged, for the spiritual benefit of her husband, it is valid, because

* *Vide* Precedents, pp. 267, 407, 27[illegible].

subsistence, for payment of revenue and for any act beneficial to the estate; as well as for religious purposes,-(*viz.*,) for payment of her husband's debts, marriage of his daughter, maintenance of those whom he was bound to support, and for securing spiritual welfare by performing religious rites, making pious and charitable gifts, and the like.*

"For women the heritage of their husbands is pronounced applicable to use (*a*). Let not women on any account (*b*) make waste (*c*) of their husbands' property."—A text of VYÁSA contained in (the Chapter entitled) the '*Dána-dharma*' of the *Mahá-bhárata.* Authority.

(*a*) Even use should not be made by wearing delicate apparel and similar luxuries; but since a widow benefits her husband by the preservation of her person, the use of property only sufficient for that purpose is authorized.—*Vi. Mi.* (Sans.) p. 194.

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the heir takes the wealth for that purpose and not for his own benefit. As the spiritual benefit of the deceased and his ancestors is promoted not only by the funeral oblations made by her, but also by the rites performed by his relatives, in which he becomes a partaker, she is directed to make presents to the paternal uncles and other relatives of the deceased in proportion to her wealth for the sake of *his* funeral rites. The payment of his debts is a moral as well as a legal duty; and the marriage of an unmarried daughter is a moral duty, which, after his death, devolves upon his wife; whatever is done necessarily for these purposes is consequently valid.—Elb. In. &c. Sect. 165.

If in any thing she may take liberties with it, it is in making pious and charitable gifts, with presents to her husband's relations and dependants, but not to her own, without their assent; the concurrence of her legal guardians and advisers, as well as of her husband's heirs, being generally necessary to any alienation by her of such property.—Str. H. Law Vol. I, (2nd Ed.) p. 247.

* *Vide* Precedents, pp. 260, 292—294, 307—330, 367, 383, 406—408, 410.

(*b*) Not on any account.] By this it is declared that 'making waste' is always obnoxious or injurious.—*Vi. Mi.* (Sans) p. 194.

(*c*) Waste] Useless expenditure.—*Ibid.*

(*c*) *Waste*] Gift, sale and other disposition at her own choice.—*Vi. Chi.* (*Sans.*) p. 152. See P. C. Tagore's translation, p. 292.

(*c*) *Waste*—signifies stealing, giving or paying uselessly to actors, dancers and the like; wearing delicate apparel, eating sweetmeats and the like; but not making gifts, &c., for religious and charitable purposes, or the like: this is implied by the term "not waste (*nápahára*)."—*Vi. Mi.* p. 194.

"After the death of the husband, the widow preserving (the honor of) the family, shall obtain the share of her husband so long as she lives; but she has not ownership (to the extent) of making a gift, mortgage or sale (thereof)."* From this text of KÁTYÁYANA it appears that a widow is competent to enjoy her husband's property *only* to preserve her life, and *not* to make a gift, mortgage, or sale thereof. But this want of independent power refers to making gifts for temporal purposes—that is giving to actors, dancers, and the like; because her power to make gifts for pious or charitable purposes and to mortgage or sell the property to enable herself to do so seems to be granted by (KÁTYÁYANA) himself (in the following text): "A widow actively engaged in meritorious observances and fasts, constant in the duties of her widowhood, intent upon restraining her passions, and making religious gifts, attains heaven even though she have no son."—*Vi. Mi.* (*Sans.*) p. 194.

Authority. "After the death of the husband, the widow preserving (the honor of) the family, shall obtain the share of her husband, so long as she lives, but she has not the property (therein to the extent of) gift, mortgage or sale." (VRIHASPATI.)† The competency of a widow to make gifts for pious and charitable purposes, such as the maintenance of old and helpless persons, being sanctioned by law, the

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* See *ante*, page 122.

† In the *Víra-mitrodoya* and *Vyavahára-mayúkha* the above text is attributed to KÁTYÁYANA.

above passage must be held as contemplating the want of independence of a widow in making gifts, &c., for purposes not being religious or charitable, but purely temporal, *such as gifts to dancers and the like.**—*Smri. Chan.* Chap. XI, Sect. i, Cl. 29.

A widow thus possesses independent power to make gifts for religious objects, and therefore the same author [VRIHASPATI] enjoins by the following passage, the constant presentation of gifts by a widow for religious purposes. "A widow actively engaged in meritorious observances and fasts, constant in the duties of her widowhood,† making daily religious gifts, even if wanting a son, shall reach the heavenly abodes."—*Smri. Chan.* Chap. XI, Sect. i, Cl. 30. Authority.

The daily making of religious gifts, as directed in the above passage would be impracticable, if the widow were held to possess no independent power. It is hence to be understood that the law does not deny the independent power of a widow even to make a mortgage or sale, for the purpose of providing herself with funds necessary for the discharge of religious duties.—*Smri. Chan.* Chap. XI, Sect. i, Cl. 31. Authority.

"A widow actively engaged in meritorious observances and fasts, constant in the duties of her widowhood,† intent upon restraining her passions, and making religious and charitable gifts, shall attain heaven, even though she have no son." From the expression 'shall attain heaven' (contained in the above text) as well as from the text of PRAJÁPATI already cited, *(viz.,)* "having taken the movable and immovable property," &c.,‡ it appears that she is competent to make gifts, &c., even in the acts or ceremonies which are optional (*kámya*), not to speak of the rites or ceremonies which are indispensable [*nitya noimittika*].—*Vi. Mi.* (*Sans.*) p. 194. Authority.

Consequently it is a settled rule that in order to make gifts for religious and charitable purposes, and to perform necessary acts, temporal as well as spiritual, a widow has Authority.

* The original of the italicised words has been omitted in the printed Sanscrit copy.

† *Ante*, pp. 102, 103. ‡ *Ante*, p. 104.

certainly power over the whole property of her husband; and the prohibitory precept is only to restrict her from mortgaging or selling the property unnecessarily for giving (or paying money) to actors, dancers and the like; whence it has been said "(she will enjoy) with moderation," that is she must not be expending uselessly. Thus our *dicta* are corroborated by the text contained in the *Dána-dharma* of the *Mahá-bhárata* (p. 133).—*Vi. Mi.* Sans. p. 195.

Authority. As to this text of KÁTYÁYANA. "After the death of the husband, the widow preserving (the honor of) the family, shall obtain the shares of her husband, so long as she lives: but she has not property (therein, to the extent of) gift, mortgage, or sale:" it is a prohibition of gift of money, or the like to *Bandí*,* *Chárana*,† and the like (swindlers.) But gift for religious objects (not visible) and mortgage or the like, suitable to those objects, may even be made, since fixed and movable property are both noticed in the above quoted text: "Having taken," &c.;‡ and from this of KÁTYÁYANA himself: "A widow actively engaged in meritorious observances and fasts, constant in the duties of her widowhood,‡ intent upon restraining (her passions), and making holy gifts, even if wanting a son, shall reach the heavenly abodes."—*Vyav. Mayú*, Chap. IV, Sec. viii, § 4.

Great benefit is done to a departed soul by paying his debts, by bestowing his daughter in marriage, and supporting his family: indeed, if these duties are neglected, he is doomed to hell. Thus—

Authority. MANU:— The support of persons who should be maintained is the approved means of attaining heaven, but hell is the man's portion if they suffer.§

Authority. DEVALA:—"To maidens should be given a nuptial portion out of the father's estate."—Coleb. Dig. Vol. I, page 185.

* A panegyrist, a bard.

† A dancer, a mime, an actor.

‡ See *ante* pp. 102, 103, 104.

§ This text like many others is not to be found in the printed Institutes of Manu, but is seen in many books of paramount authority.

This is proper: for should the maiden arrive at puberty unmarried, through poverty, her father and the rest would fall to a region of punnishment, as declared by holy writ. Thus, VASHISTHA says:—"So many seasons of menstruation as overtake a maiden feeling the passion of love and sought in marriage by persons of suitable rank, even so many are the beings destroyed by both her father and mother: this is a maxim of the law."* Authority.

So also POITHÍNASI:—A damsel should be given in marriage before her breasts swell. But if she have menstruated (before marriage), both the giver and the taker fall into the abyss of hell; and the father, grandfather and great-grandfather are born (insects) in ordure."* Authority.

NÁRADA:— Therefore, a son begotten should relinquish his own property, and assiduously redeem his father from debt, lest he fall into a region of torment.—Coleb. Dig. (Cal. Ed.) Vol. I, p. 199. Authority.

Whatever the husband had promised to give to a person, the same, after his death, should be given by his widow to the same person, as that also is a debt (of her husband).† Because says—

HÁRÍTA: "A promise made in words but not performed in deed, is a debt (of conscience) both in this world and in the next.† Authority.

The inference is also the same when any other succeeds (to the estate of the deceased.)†

PRAJÁPATI:—Having taken his movable and immovable property, the precious and base metals, the grains, the liquids, and the clothes, let her duly offer his monthly half-yearly, and yearly funeral repasts. With presents offered to his *manes*, and by pious liberality, let her honor the paternal uncles of her husband, his spiritual parents (*guru*), and daughter's sons, the children of his sisters, his maternal uncles, and also aged and unprotected persons, guests, and Authority.

* Coleb. Dig. Vol. III, p. 460.

† Coleb. Dig. Vol. III, (Lond. Ed.) p. 461.

females (of the family).—*Vyav. Mayú.* Chap. IV, Sect. viii, § 2;—and *Ví. Mi.* (Sans.) p. 193. See *Smri. Chan.* Chap. XI, Sect. i, Cl. 20.

Rule. The rule inculcated is that, a widow having taken her husband's property inclusive of immovables, should by making presents to his relatives, perform acts (within the competency of a female to perform) by which spiritual welfare may be secured to the husband and herself.*—*Vi. Mi* (Sans.) page 193.

Authority. Further in the text—" Paternal uncles, spiritual parents, (*guru*), and daughter's sons," &c. (*ante* p.105), VRIHASPATI having indicated husband's relatives by the term 'paternal uncles,' his daughter's children, by the term 'daughter's son,' and maternal relations, by the terms 'maternal uncle and aunt,' the widow in her husband's *sráddha* and other rites relating to his *manes*, should bestow on them, but not on her own relations, presents proportionate to the wealth, and productive of spiritual benefits;—with the consent of the former, however, she may bestow gifts on her paternal relations also.—*Ví. Mi.* (*Sans.*) p. 194.

Authority. VYÁSA:—After the death of her husband, let a virtuous woman observe the duty of continence, and let her daily, after the purification of the bath, present, from the joined palms of her hand, water mixed with *til* (sesamum) to the *manes* of her husband. Let her day by day perform with devotion the worship of the Gods, and the adoration of VISHNU, practising constant abstemiousness. She should give alms to the chief of the venerable for increase of holiness, and keep the various fasts which are commanded by sacred ordinances. A woman who is assiduous in the performance of duties conveys her husband, (though abiding in another world,) and herself to a region of bliss.—*Ibid.*

Vyavasthá. **105. Without the consent of her husband's reversioners a widow is, however, competent to sell so much, and no more, of his property as may be required for the performance of the indispensable**

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* Almost the same rule is laid in *Smriti-chandriká.* See *ante*, p. 108.

duties *(nitya-karma).** If such acts cannot be performed without selling the whole property, the whole may be sold by her for that purpose, because such duties *must* be performed. But for the performance of an optional religious act *(kámya karma)* she may, without their consent, dispose of only a small portion of the estate (*a*).†

(*a*) An indispensable act or duty (*nitya-karma*) is that which *must* be performed, and cannot be neglected without sinning, as the first *sráddha* of the father or of the husband,—the marriage of his daughter, or the like. And an optional religious act is such as the performance of it rests upon option, and there is no sin on the non-performance, but religious merit (*punya*) on the performance thereof,—as pilgrimage to Benares and the like.

106. If, however, the expenses for those acts including maintenance could possibly be defrayed with the accumulated wealth, or with the income of the estate, left by the deceased, then his widow cannot sell any part of his estate for the performance of any such act, much less on account of any debt contracted by her for her own purposes.‡ Further,— *Vyavasthá.*

107. If the reversioners supply, or agree to supply, to the widow expenses for her subsistence and performance of religious acts, in that case also the widow cannot sell any portion of the estate.§ *Vyavasthá.*

108. For acts other than those which are sanctioned by law, as already stated (*ante* pp. 132—138) a widow can dispose of her husband's property *only* *Vyavasthá.*

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* *Vide Vyavasthás* 103 and 104 and the authorities, &c., relative thereto.

† See Precedents, pp. 307, 314, 319—326, 340, 367, 407.

‡ See the case of Hafeezun-nissa Begum *versus* Radha Benode Misser, S. D. A. Decis, for 1856, p. 995. *Vyavasthá Darpana,* (Second edition,) page 78, and Precedents, pp. 337—339.

§ *Vide* Precedents, pp. 383, 407.

with the consent of the reversionary heirs of her husband, but not otherwise.*

Vyavasthá. **109.** If there be no such reversionary heir, still the widow, who is not a *Bráhmaní* but of any other caste, cannot, for acts not sanctioned by law, dispose of her husband's property even without the consent of the ruling power, inasmuch as on failure of all heirs of a deceased proprietor who was not a *Bráhmana* the sovereign is entitled to take his property, and a woman is never independent but always under restriction and control.†

Authority. NÁRADA :—When the husband is deceased, his kin are the guardians of his sonless widow; in the disposal and preservation of property as well as in her maintenance, they are

Annotations.

109. The Policy of the Hindú Law, with regard to the female sex, being, that it is never, at any period of their lives, or under any circumstance, to be independent. "Day and night (says MANU,) must women be held by their protectors in a state of dependence. Their fathers protect them in childhood; their husbands protect them in youth; their sons protect them in age. A woman is never fit for independence." And a preceding text, in which the same condition is inculcated, establishes her dependence, if she have no sons, "on the near kinsmen of her husband; if he left none, on those of her father; and, having no paternal kinsmen, on the sovereign;" concluding, as already stated, that "a woman must never seek independence;" and carrying the principle to the length of declaring, that "by a girl, or by a young woman, or by a woman advanced in years, nothing must be done, even in her own dwelling-place, according to her mere pleasure." Failing relations of her husband, she is to reside with her own, enjoying their protection, and being subject to their control.—Stra. H. L. Vol. I (2nd Ed.) pp. 244—245.

* *Vide* Precedents, pp. 260, 267, 274—278, 288, 292—294, 340, 410, 411.
† *Vide* Precedents, pp. 260—267, 311.

her lords (*ishwara*). But if the husband's family be extinct, or contain no male, or be helpless, the kin of the widow's father are her guardians, if there be no relations of her husband within the degree of *sapindas*.*—13. 28, 29.

MANU:—By a girl, or by a young woman, or by a woman advanced in years, nothing must be done, even in her own dwelling place, according to her mere pleasure (1).—Chap. v, *verse* 147. Authority.

MANU:—In childhood, must a female be dependent on her father; in youth, on her husband; her lord being dead, on her sons; *if she have no sons, on the near kinsmen of her husband; if he left no kinsmen, on those of her father; if she have no paternal kinsmen, on the sovereign*: a woman must never seek independence (1).† Chap. V, *v.* 148. Authority.

In childhood a female must be under the control of her father, in youth, of her husband, after his death, of his son; if there be no son, and no relation within the degree of his *sapindas*, the kin of her father become her guardians. If (males in) both families be extinct, then according to this text of NÁRADA: "The sovereign is the lord of women," she must be under the control of kinsmen, sovereign and the rest: she must never be independent (1).—KULLÚKA BHATTA'S commentary on the above text. Authority.

MANU:—Day and night must women be held by their protecters in a state of dependence (1).—Chap. IX, *v.* 2. Authority.

Annotations.

(1) Whatever may be thought of such a state of Hindú females by the now-civilized nations, it appears to have existed amongst

* Others expound the above text of NÁRADA as signifying that (the nearest kinsman in) the family of her husband has authority in the disposal of property, that is, in donation. She may give a present to *that* person on whom the kinsman of her husband bids her confer one; she may bestow *that* which he bids her give away.—Coleb. Dig. (Lond. Ed.) Vol. III, p. 462.

† The original of the italicised words in the above passage are not to be found in the Sanscrit text, but have been, by way of innendoes, supplied by the learned translator from *Kullúka Bhutta's* commentary, a separate translation of which is above given.

Authority. MANU:—Their fathers protect them in childhood; their husbands protect them in youth; their sons protect them in age: a woman is never fit for independence.—Chap. IX, *verse* 3.

Authority The father protects a female before her marriage, after that her husband protects her, in his default her sons protect her; a woman therefore is never fit for independence.(1) KULLÚKA BHATTA'S commentary on the above text.

Annotations.

the most civilized and renowned nations of antiquity; as is evident from the subjoined passages:—

"A few words will suffice to assimilate the condition of the sex among the old Romans. *Mulieres omnes*, (says Cicero,) *propter infirmitatem consilii, majores in tutorum potestate esse voluerunt*:* and Livy, to the like effect, *Nullam ne privatam quidem rem agere fœminas sine auctore voluerunt; in manu esse parentûm, fratrum, virorum.*"†

"It was the same before them with the Greek women; nor can these strictures in this respect be better closed, than by the following extract from a late elegant little work, on the states of ancient Greece, whose institutions the Romans copied; exhibiting, with regard to the vassalage of the sex, the substance of many a text of *Menu*, and yet not a perfect picture of it, as it existed at the time to which the account refers; omitting, as it does, all allusion to that extraordinary feature, already noticed, the power of the husband to dispose of his wife by *will*, to any man whom he might choose for his successor. Speaking of the Athenian women, in an age too of refinement, 'They lived (says the learned and ingenious author) in a remote quarter of the house, and were never allowed to mingle in society with the men. They were not permitted to go abroad, without being attended by a slave, who acted as a spy upon their conduct. They were given in marriage without their consent; and were expected to make the care of their families the sole object of their attention. In a funeral oration composed by Plato, in the

* Cic. pro. Muren. II. † Liv. XXXIV. 2.

Should it be asked if a widow is competent to make a disposition, not sanctioned by law, of her husband's property, with the consent of his reversioners, is she to take the consent of *all* of them, or of *any* of them in particular?—The answer is, it has been determined that—

110. For the validity of an alienation not sanctioned by law, the consent of those reversioners of the husband is necessary who are likely to be interested in disputing it; and it is their consent alone that renders a widow competent to make such an alienation of her husband's property.* *Vyavasthá.*

The mere attestation of conveyance by a relative does not necessarily import his concurrence or consent, but it is requisite that he should actually give his consent to the transaction at that time or ratify it subsequently.—*Vide* precedents, pp. 288, 292—294, 302. Further,—

111. Being unable to hold and manage, or for any other cause, the widow may surrender or make over the property to the *then* next reversionary heir, or, with his consent, to the heir next after him, and thus accelerate his succession.† *Vyavasthá.*

Likewise,—

112. Upon the widow's resignation of the worldly concerns, or voluntary abandonment, the estate *Vyavasthá.*

Annotations.

person of Pericles, he makes that illustrious statesman exhort the Athenian women, to mind their domestic concerns; and assure them, that they would be most faithful in the discharge of their duty, when they never attracted the notice of their fellow-citizens."‡—Stra. H. L. 2nd Ed. Vol. I, pp. 252—253.

* *Vide* precedents, pp. 302, 292—294 288.

† *Vide* Precedents pp. 295—306.

‡ Hill's Essays on the Institutions, &c. of the States of ancient Greece, page 266.

inherited by her descends at once to the next reversionary heir, as she is thereby divested of her property by abdication.*

Vyavasthá. **113.** But, if without the consent of the above-mentioned reversionary heirs of her husband, a widow do alienate his property without a legal necessity or for purposes not sanctioned by law, the alienation so made is illegal and invalid, and the reversionary heirs have a right to restrain her from so doing, or to have the same set aside.†

Vyavasthá. **114.** Primarily, the immediate reversioners possess such right and not those who are next after them, unless the former be incapable of doing so, or unwilling to do it through collusion with the widow, or if they have relinquished their rights in favor of the latter or authorized them to exercise it.‡

Vyavasthá. **115.** In the event of an alienation made by a widow of her husband's property being set aside, the property should revert to her, if she have not already committed any act involving forfeiture of her right of inheritance.§

Reason. Because while the widow lives free from any defect causing disherison, the reversionary heirs who are posterior or inferior to her have no right in supercession to her, also because the right of such heirs accruing only at the death (natural or civil) of the widow, and there being no certainty of their surviving the widow, their right is merely a contingent one. In other words, although the reversioners may have a wrongful alienation made by a widow set aside yet they cannot take possession of the property recovered from the purchaser, they not being *then* vested with the

* See *ante*, pp. 20—22, and Precedents pp. 22—30, 36, 37, 296.

† See *ante*, pp. 122, 123 and Precedents, pp. 288, 332—340, 352—357, 372, 373, 385—388, 406, 407, &c.

‡ *Vide* Precedents pp. 353—357, 370—376, 383—489.

§ *Vide* Precedents, pp. 352—357, 386, 387.

right to do so, and the widow not being divested of her heritable right.

116. If, however, it be satisfactorily proved that the widow has made waste to the injury of those who have the reversionary interest, and the property is in danger, so that, but for the interference of the Court of Justice, representing the Sovereign, the reversioners who may eventually succeed would suffer loss from the acts of the widow, then, and not until then, the Dispensers of justice, may, with a view to remedying the evil, or preventing such loss, take the management of the property from her hands, and adopt such measures whereby the estate may be secured for the ultimate heirs, provided those measures do not affect the widow's rights as the then heiress entitled to enjoy the income.* *Vyavasthá.*

117. According to the modern Judges of British India any alienation or transfer of her husband's property made by the widow, whether for an allowable cause or otherwise, should remain intact until her death,† the reversionary heir may, however, institute a suit even during the lifetime of the widow to declare that the conveyance was executed for causes not allowable, and is therefore, not binding beyond the widow's life; and also for remedy against the grantee to prevent waste [illegible] *Vyavasthá.*

* *Vide* Precedents, pp. 352–357, 386 &c.

It has been accordingly determined that a Court of Justice, like the Court of Wards, may step in, and appoint a Receiver to take charge of the estate. The reversionary heir may be the Receiver, but his appointment as such is not by virtue of the reversionary right, but in consideration of what would be most for the benefit of the estate. The Court would give him possession conditionally upon his paying the income of the property to the widow empowering her on the other hand to move for his removal on his not paying it. See the precedents above noted.

† See however the Privy Council decision which is at page 260 of the Precedents and which is quite in conformity with the Hindu law.

or destruction of the property whether movable or immovable.*

SECTION II.

On Daughters' Right of Succession.

As those persons, who are exhibited in the text "the wife, and the daughters," &c.† to be the next heirs on failure of the prior claimants, would have succeeded if the widow's right had never taken effect, so shall they equally succeed to the residue of the estate remaining after her use of it, upon the demise of the widow in whom the succession had vested. At such time (when the widow dies, or when her right ceases) the succession of daughters and the rest is proper, since they confer greater benefits on the deceased (by oblations presented) than other claimants.‡ Therefore,—

Vyavasthá. **118.** In default of the widow the daughters inherit the estate of the man who died separated (from his co-parceners) and not re-united (with them.)||

Annotations.

118. In default of the widow, the daughter inherits, but neither is her interest absolute. It may here be mentioned, that the above rule of succession is applicable to Bengal in every possible case; but, elsewhere, only where the family is divided: for according to the doctrine of the Benares and other schools, even the widow, to whom the daughter is postponed, can never inherit, where the family is in a state of union; nor can the mother, daughter, daughter's son, or grandmother. The father's heirs in such case exclude them.—Macn. H. L. Vol. I, pp. 21, 22.

The right of daughters to succeed, in default of sons and widow, is not to be confounded with that of the *appointed* daughter, under

* See Precedents, pp. 342—351, 368—372, 385—388.

† *Ante*, page 99. ‡ *Vir-Mitrodoya*, page 194.

|| *Vide* Precedents, pp. 412—416, 443—445.

It is a settled rule, that a wedded wife, being chaste, takes the whole estate of a man, who, being separated from his co-heirs, and not subsequently reunited with them, dies leaving no male issue. On failure of her the daughters inherit.—*Mit.* In. Chap. II, Sect. i, § 39, and Section ii, § 1. Authority.

On failure of wives, the heritage devolves on the daughters, according to the preceding text of VISHNU.*—*Vi. Chi.* p. 292. Authority.

In default of the wife, the daughter succeeds.—*Vyav. Mayú.* Chap. IV, Sect. VIII, § 10. Authority.

MANU:—The son of a man is even as himself, and the daughter is equal to the son. How then can any other inherit (his) property, notwithstanding the survival of her, who is, as it were, himself† (*a*).—*Smri. Chan.* Chap. XI, Sect. ii, Cl. 7;—*Vi. Mi.* (Sans.) p. 203. Authority.

(*a*) Who is as it were himself] who is equal to the son, who is as it were himself.—*Smri. Chan.* Chap. XI, Sect. ii, Cl. 7.

NÁRADA:—"On failure of male issue, the daughter inherits, for she is equally a cause of perpetuating the race: both the son and daughter are the means of prolonging the father's line of descendants."‡—*Smri Chan.* Chap. XI, Sect. ii, Cl. 9;—*Vi, Mi.* (Sans.) p. 204. Authority.

Annotations.

the old law. The daughter under consideration takes as a principal in her own right, in default of the widow, who has precedence.—*Stra. H. L.* Vol. I, (2nd Ed.) p. 137.

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* See *Ante*, page 108.

† See *Vyav. Mayú.* Chap. IV, Sect. viii, §10, in which the translation given of the above text is not accurate.

‡ *The line of descendants* here intends such descendants as present the oblation cake; for one who is not an offerer of oblations, confers no benefits, and consequently differs in no respect from the offspring of a stranger or no offspring at all. The daughter's son is the giver of oblations, not his son; nor the daughter's daughter; for the oblation ceases with him.

The objector says,—"No reason has been adduced to show why the right of succession of a daughter should be postponed to that of *a secondary son* and *widow*, the reason stated by VRIHASPATI simply accounts for her title to succeed *on failure of a begotten son*." This is true, but VRIHASPATI, in giving the reason, intends that the same must be taken to apply where a daughter succeeds in default of a secondary son and widow. NÁRADA, conscious of the justness of the proposition, that a daughter should succeed on failure of a secondary son and widow, says, for the information of the uninstructed, "On failure of male issue, the daughter inherits, for, she is equally a cause of perpetuating the race." The reason why the daughter is equally a cause of perpetuating the race, the same author explains by saying "since both the son and daughter are the means of prolonging the father's line."—*Smri. Chan.* Chap. XI Sect. ii, Cl. 8, 9.

The meaning is, that the son and daughter both give birth to children, by whom the prosperity of their own parents is promoted. Here the equality contemplated between a son's son and a daughter's son must be understood to be an equality *in point of efficacy*, both the sons being *in their nature*, unequal. There is no equality between them in point of clearing off the debts and inheriting the assets of the deceased, it being declared "Debts must be paid by sons and son's sons." Referring to a grandfather's property, it has further been declared, "The ownership of the father and son is the same in it." The superiority of a son's son being, by these texts, declared in respect of assets and debts, the equality contemplated by the text of NÁRADA, above quoted, between a son's son and a daughter's son must be understood to consist in conferring benefits not temporal, that is, in the performance of *Srádhas*; it being declared by VISHNU: "In offering oblations to the *manes*, the daughter's sons are considered as son's sons." The daughters, therefore, stand conspicuous in the line of succession, by reason of their conferring benefits by means of their descendants.—*Smri. Chan.* Chap. XI, Sec. ii, Cl. 10.

It cannot, however, be hence said, that where there is no male issue, a daughter inherits in preference to a widow

(*patni*); the latter being in her own person competent to associate in the performance of religious sacrifices (*agni-hotra*) &c., which are acts capable of conferring spiritual benefits on the deceased. Therefore, the term "male issue" used in the passage "on failure of male issue, the daughter inherits," must be considered by synecdoche to include a *patni* (widow) also.—*Ibid.*, Cl. 11.

VISHNU:—The wealth of a man who leaves no male issue goes to his wife; on failure of her, to his daughter.* Authority.

VRIHASPATI:— The wife is pronounced successor to the wealth of her husband; in her default, the daughter. As a son, so does the daughter of a man proceed from his several limbs. How then, should any other person (*b*) take her father's wealth?—*Mit. In.* Chap. II, sect. ii, § 2;—See *Smri. Chan.* Chap. XI, Sect. ii, Cl. 1 and 3.

(*b*) Any other person] These terms exclude the son and widow, (who are preferable heirs,) and include the father and the rest.—*Smri. Chan.* Chap. XI, Sect. ii, Cl. 5 & 6.

The meaning is how could the father and the rest take the property of a sonless man, while the daughter is alive? See *Ibid.*

In springing from the limbs of the father, a daughter is equal to a son. The difference, however, is this. In the procreation of a son, the contribution of the father's part is greater; whereas, in that of a daughter, it is less, it being declared "A male child is procreated, if the seed predominate, but a female child is procreated if the woman contribute most to the fœtus."† Hence a daughter is pronounced equal to a son to a certain extent.—*Ibid.* § 4.

But what kind of daughter is competent to receive her father's heritage, is declared by the same author,‡—

VRIHASPATI:—Being of equal class(*c*) and married to a man of like tribe (*d*), being virtuous [*sádhwí* (*e*)] and devoted to obedience, and being formally appointed or not Authority.

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* See *ante*, page 108. † MANU.

‡ *Viváda-chintámani*, page 293.

appointed to continue the male line, she (the daughter) shall take the property of her father.—*Smri. Chan.* Chap. XI, Sect. ii, § 26;—*Vi. Chi.* p. 293;—*Vi. Mi.* (Sans.) page. 204.

(*c*) Being of equal class] Being of the same class with the father, that is, born of a wife of the same class with the father. *Smri. Chan.* Chap. XI, Sect. ii, § 27.

(*d*) Married to a man of like tribe] This is intended to exclude one married to a man of superior or inferior tribe. For the offspring of a daughter married to a man of a higher or lower class is forbidden to perform the obsequies of his maternal grandfather and other ancestors who are of inferior or of superior rank. But one, married to a man belonging to the same class, confers benefits on her father by means of her son.

The four epithets (being of equal class and married to a man of like tribe, being virtuous and devoted to obedience) first mentioned, in the above passage, refer to a daughter claiming inheritance *after* a widow, and the two epithets (being *formally* appointed or not appointed) last mentioned, to a daughter claiming inheritance before a widow. Being formally appointed or *not* appointed to continue the male line.] Here, an appointed daughter (whether formally appointed or not) must be understood. The term "daughter" (which has not been expressly mentioned in the passage) must be understood before the other four epithets.—*Smri. Chan.* Chap. XI. S. ii. Cl. 27.

Vyavasthá. 119. (*e*) Being virtuous] By this term an unchaste daughter is excluded from the inheritance.*

It being laid down that an unchaste widow does not inherit, *a fortiori* a daughter, who is inferior to the widow, or whose heritable right is weaker than that of a widow, cannot inherit, if *unchaste.* See *ante,* pp. 116, 117 and Precedents, pp. 417, 425, 427, 433.

Vyavasthá. **120. A daughter being entitled to inherit the divided property of her father, it has been, by parity of reasoning, determined that, she is entitled to inherit also such property as was separately**

* *Vide* Precedents, pp. 251—257, 402, 403, 447.

acquired or held by him, or was vested in him though its enjoyment was postponed till after a contingency.*

Because such property, not being held in common with any one else, is of the nature of a divided property. Reason.

121. Of the daughters married and unmarried, the unmarried is, in the first place, the sole heiress of her father's property.† *Vyavasthá.*

In the case also where some of them are married, and some unmarried, the unmarried ones alone (succeed), by reason of this (*i. e.*, the following) text of KÁTYÁYANA.—*Vyav. Mayú.* Chap. IV, Sect. viii, § 11. Authority.

KÁTYÁYANA :—Let the widow succeed to her husband's wealth, provided she be chaste: and, in default of her, let the daughter inherit, if unmarried.‡—*Vyav. Mayú.* Chap. IV, Sect. iii, § 11;—*Mit. In.* Chap. II, Sect. ii, § 2. Authority.

Annotations.

121. But there is a difference in the law, as it obtains in Benares, on this point, that school holding that a maiden daughter is in the first instance entitled to the property. According to the law of Mithila an unmarried daughter is preferred to one who is married.—*Macn.* H. L. Vol. I, p. 22.

121—123. A maiden is in the first instance entitled to the property; failing her, that the succession devolves on the married daughters who are indigent, to the exclusion of the wealthy daughters; that, in default of indigent daughters, the wealthy daughters are competent to inherit; but no preference is given to a daughter who has or is likely to have male issue, over a daughter who is barren,|| or a childless widow.—*Macn.* H. L. Vol. I, p. 22.

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* *Vide* Precedents, pp. 244, 443.

† *Vide* Precedents, pp. 416, 445.

‡ In the *Smriti-chandriká* the last word of the above text is "*Pratishthitá*" instead of "*bhabet-tadá,*" and it is rendered by unprovided.'" See *Krishna Swámi Iyer's* translation, page 175.

|| See however, page 154.

Authority. If there be competition between married and unmarried daughters, the unmarried one takes the succession under the specific provisions of the text above cited ("in default of her, let the daughter inherit, if unmarried.")—*Mit.* In. Chap. II, Sect. ii, § 3.

Vyavasthá. **122. In default of the maiden daughters the married daughters inherit their father's estate.***

Authority. PARÁSHARA :—Let a maiden daughter take the heritage of one who dies leaving no male issue; if there be no such daughter, a married one shall inherit.—*Vi. Chi.* p. 293.

BÁLRÚPA is of opinion that here such is the order of succession.—*Vi. Chi.* (*Sans.*) p. 153.—See P. C. Tagore's translation, p. 293.

Vyavasthá. **123. Among the married daughters if there be competition between an unprovided and an enriched daughter, the unprovided one inherits, in her default, the enriched one.†**

Authority. Among the married ones when some are possessed of (other) wealth, and others are destitute of any, these the (last) even will obtain (the estate), from this text of GOUTAMA. "A woman's property goes to her daughters, unmarried, or unprovided for." *Unprovided for*] Destitute of wealth. Those acquainted with traditional law, hold that the word, 'woman's' (wife's) includes the father's also. —*Vyav. Mayú.* Chap. II, Sect. viii, § 12.

Authority. If the competition be between an unprovided and an enriched daughter, the unprovided one inherits; but, on failure of such, the enriched one succeeds: for the text of GOUTAMA is equally applicable to the paternal, as to the maternal, estate. "A woman's separate property goes to her daughters, unmarried or unprovided." It must not be supposed, that this relates to the appointed daughter: for, in treating of male issue, she and her son have been pronounced equal to the legitimate son ("Equal to him is the

* *Vide* Precedents, pp. 413, 416, 445. † *Vide* Precedents, pp. 413, 415, 416.

son of an appointed daughter," or the daughter appointed to be a son.)—*Mit.* In. Chap. II, Sect. ii, § 4, 5.

The conclusion, therefore is, where there is a competition between a daughter unprovided and one unmarried, both being of the same class with their father, and possessing the other qualifications mentioned in the text,* the unmarried alone first takes; the maintenance of such daughters out of the wealth of the father being indispensable. On failure of such a daughter, the unprovided one takes, such a daughter, being destitute of the means of subsistence, owing to the inability on the part of her husband to maintain her, although he is bound to do so. In default of unprovided daughters, the daughter provided or enriched and possessing the qualifications of equality of class, &c., takes, such a daughter, though provided, being competent to inherit. On failure of daughters, the daughter's son inherits, he being the offspring of the daughter.—*Smri. Chan.* Chap. XI, Sect. ii, § 28. Conclusion.

Thus in default of the widow, where there is competition among daughters enriched, unprovided for and unmarried, all being of the same class with their father, and possessing the other qualifications (mentioned in the text cited,)* the unmarried alone takes in the first place, as her father was bound to maintain her; in default of her, the (daughter) unprovided for takes—such daughter being destitute of the means of subsistence owing to the inability on the part of her husband to maintain her, although he was bound to do so; failing her, the daughter provided for or enriched also possessing the qualifications of equality of class, &c., already mentioned,* takes the estate though she be provided for and enriched.—*Vi. Mi.* (*Sans.*) p. 205.

124. According to the doctrine of the law as current in *Mithilá*, no distinction is made among the married daugh- *Vyavasthá.*

Annotations.

124. According to the law of Mithila, an unmarried daughter is preferred to one who is married: failing her, married daughters

* See *Ante*, pages, 149 and 150.

ters with respect to their being provided, unprovided, barren and so forth, but on failure of the maiden daughter, all married daughters without any difference succeed equally and simultaneously.—See, *ante* p. 152.

Vyavasthá. **125. According to the *Smriti-chandriká*, the daughter who is barren, or destitute of a son to confer spiritual benefits on her deceased father, does not inherit from him.**

Authority. "Let the widow succeed to her husband's wealth,' provided she be chaste, and in default of her (*h*), the daughter inherits, if *unmarried* or *unprovided.*" By this it is inferrible that the above passages* have reference to daughters either unmarried or unprovided. "Unprovided" here means unprovided with wealth and not unprovided with offspring(*i*), such as barren daughters and the like, for, daughters of the latter description are not at all entitled to inherit their deceased father's estate, they being incapable of conferring on him benefits spiritual through the medium of their offspring.—*Smri. Chan.* Chap. XI, Sec. ii, Cl. 20, 21.

(*h*) "In default of her" means here not in default of a *Patní* generally, but in default of that kind of *Patní*, who is not tainted with incontinence.—*Ibid.*, Cl. 21.

(*i*) Here by 'Offspring' is meant only the son of a daughter, not her daughter or son's son, because, except the son no other offspring of a daughter can offer the oblation cake and confer spiritual benefit on her deceased father.

The author of the *Víra-mitrodaya* is of the same opinion. He says—"GOUTAMA propounds that a woman's separate

Annotations.

are entitled to the inheritance, but there is no distinction made among the married daughters; and one who is married, and has, or is likely to have, issue, is not preferred to one who is widowed and barren; nor is there any distinction made between indigence and wealth.—Macn. H. L. Vol. I. p. 22.

* That is the texts of MANU, NÁRADA, and BRIHASPATI, cited in pp. 147, 149.

property goes to her daughters, unmarried or unprovided for." Although he says "a woman's separate property," yet by parity of reasoning it applies also to a father's property. By the term "unprovided for" it should not be understood a woman unprovided with offspring by reason of her being barren and the like, inasmuch as such a woman is not entitled to inherit in consequence of not conferring spiritual benefit through her offspring (that is son).—*Vi. Mi.* (*Sans.*) p. 205.

126. If there be several daughters capable of inheriting, they all take their father's heritage, or divide it among themselves.* *Vyavasthá.*

But if there be more than one, they will divide it, and take shares.—*Vyav. Mayú.* Chap. II, Sect. viii. § 9. **Authority.**

If the daughters competent to succeed be numerous, a distribution should be made among them.—Coleb. Dig. Vol. III, (Lond. Ed.) p. 498. **Authority.**

The word 'daughters' is used in the plural number—to show that those of the same class (with their father) get equal shares, and those of different classes get shares in accordance with their tribes.—*Vi. Mi.* (Sans.) p. 205. **Authority.**

127. Upon the death, natural or civil, of any of the daughters in whom succession had vested, the surviving daughters take the portion of the patrimony inherited and vacated by the deceased, not the daughter's son and the rest.† *Vyavasthá.*

Annotations.

126. The daughters are named in the plural number to suggest the equal or unequal participation of daughters alike or dissimilar by class.—*Mit.* In. Chap. II, Sect. ii, § 1.

127. On the decease of one of them, whether they have male issue or not, the estate devolves on the surviving daughter; and it is not till after the death of all these daughters that the estate goes to the next heir of the father.—Elb. In. Sect. 168.

* *Vide* Precedents, pp. 416, 433, 444.

† *Vide* Precedents, pp. 416, 433, 434.

In the case where two daughters succeeded to their father's estate, and one of them died leaving her sister then a childless widow, and a son, a question

Reason. Because daughter's sons being posterior or inferior to daughters, their succession has been ordained in default of daughters.

Further, upon the death, natural or civil, of any of the daughters who inherited their patrimony, the surviving daughters are alone entitled to the portion of the patrimony inherited and vacated by their deceased sister and not the son of the deceased daughter, becuase a daughter being nearer than a daughter's son, the latter cannot inherit so long as there exists a single daughter competent to inherit. Should it be asked, how it is that a son's son whose father is dead inherits his grandfather's estate simultaneously with his paternal uncle? The answer is—He does so under special texts to that effect, and there is no text ordaining that a daughter's son whose mother is dead should inherit his maternal grandfather's property simultaneously with his mother's sister.

Vyavasthá. **128. The right once vested in a daughter does not cease until her death, notwithstanding she be barren or a sonless widow who bore daughters only.***

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may arise whether the property inherited by the deceased woman would be taken by her son, or would devolve upon the sister though then disqualified to inherit. There are opinions both ways: some lawyers are of opinion that the surviving sister being a childless widow, and (therefore) incompetent to inherit, the property should devolve on the son of the deceased. But others maintain that the surviving sister being disqualified to inherit at the time of her sister's death is no bar to her taking her father's property left by the sister, because she does not inherit her sister's property so that her disqualifications at the time of *her* death should be taken into consideration; (and the fact of its being her father's, and not her sister's, property is manifest from her not having had absolute proprietary right over it, but only a restricted interest therein, as well as from its devolving on her father's heirs and not on her own heirs :) and because, like wives, the two daughters were, in the legal sense, held to be one and the same heir collectively succeeding to, and holding, their father's property, which on the death of one would of course remain in the hands of the other. This (latter) opinion is maintained by the High Court in its Original Jurisdiction. See Case No. 66 of 1865—*Boidya-nath Sett plaintiff* versus *Durgá-charan Basák*, decided on the 28th of February, 1865, by Hon'ble W. Morgan who consulted the Hon'ble *Shambhu-nath Pandit* on the point in question. See V. D. p. 170. The latter opinion has also been adopted by the Privy Council.—*Vide* Precedents, p. 434.

* *Vide* Precedents, p. 434.

Because being barren or a sonless widow is not, like civil death, a cause of destroying heritable right already accrued and vested.* Reason.

129. The daughter, too, without a legal necessity or any of the acts, religious or secular, mentioned in the widow's succession† is incompetent to make a gift, mortgage or sale of the property inherited by her, but is to enjoy it with moderation until her death. After that, her father's (next) heirs will take it.‡ *Vyavasthá.*

As a daughter is inferior to a widow, or her right is weaker than that of a widow, she, in the disposal of her father's heritage, is certainly subject to the same restrictions and liberties as a widow is in the disposal of her husband's heritage. See Precedents pp. 424 and 434, Note. Reason.

In other words the next heir of the former owner being entitled to inherit the property inherited and vacated by a widow, it has been determined that the word widow (*patní*) is employed with a general import; and the rule on the above point laid down in the widow's succession, must be understood as applicable generally to the case of a woman's succession to inheritance.—*Vide* Precedents pp. 417, 424, 427, 433, 435.

130. The word widow (*patní*) being employed with a general import to embrace all the females *Vyavasthá.*

Annotations.

129. In default of the widow, the daughter inherits, but neither is her interest *absolute*.—Macn. H. L. Vol. I, p. 21.

129, 130. As the daughter's right to succeed is inferior to that of the widow, it necessarily follows that she too is only to enjoy the property, and that she is subject to the same restrictions in the use of it, as the widow. On her death, the estate goes to her father's next heir.—Elb. In. Sect. 171.

* See the Chapter on Exclusion from Inheritance.

† See *ante* pp. 132—138. ‡ *Vide* Precedents, pp. 416, 424, 427, 433, 435.

entitled to inherit, whatever liberties and restrictions are provided in the widow's succession, all those are applicable to the succession of daughters and other females entitled to inherit.*

But,—

On the ground of the text:—"The son of a man is even as himself, and the daughter is *equal* to the son," &c. (*ante* p. 147) it has been determined by the High Court and the late Supreme Court of Bombay that—

Vyavasthá. **131.** A daughter has absolute power over the property inherited by her from her father, just as she has over her *strí-dhan* (woman's *peculium*); and that after her, such property is to be inherited by the heirs to her *strí-dhan*.†

Vyavasthá. **132.** While the High Court of Madras has held that a daughter has absolute power over the movable portion of her father's heritage which she can dispose of at pleasure (like her *strí-dhan*), but not over the immovables inherited by her from him.‡

* *Vide* Precedents, pp. 417, 427, 433, 435. † *Vide* Precedents, pp. 420, 428.

‡ *Vide* Precedents, pp. 422, 273, 274.

SECTION III.

ON DAUGHTER'S SON'S SUCCESSION.

133. On failure of the qualified daughter of a man who died separated from his co-heirs and not subsequently reunited with them, his daughter's son inherits from him.* *Vyavasthá.*

YÁJNAVALKYA:—The wife, and the daughters *also* (*a*), &c. *Ante* page 99.

(*a*) By the import of the particle "*also*" the daughter's son succeeds to the estate on failure of daughters.—*Mit.* In. Chap. II, Sect. ii. § 6. Authority.

In default of daughters, the daughter's son (succeeds).—*Vyav. Mayú,* Chap. IV, Sect. viii, § 13.—*Vi. Mi.* (*Sans.*) page 205. Authority.

A daughter's son being the offspring of a daughter, is more nearly connected with the deceased than a father is: VISHNU has declared it.—*Smri. Chan.* Chap. XI, Sect. ii, Clause 15. Authority.

VISHNU:—Where there exists no son or grandson(*b*), the daughter's son inherits the wealth. In offering oblations Authority.

Annotations.

133. According to the law of Bengal and Benares the daughter's sons inherit in default of the qualified daughters; but the right of daughter's sons is not recognized by the *Mithila* School.†—Macn. H. L. Vol. I, p. 23.

Where there are (daughter's) sons, their right of succession is postponed to that of other daughters of the deceased.—Stra. H. L. Vol. I, p. 139.

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* *Vide* Precedents, pp. 433, 448—454, 459—561, 484.

† This is not correct: the heritable right of daughter's sons is certainly recognized in the *Mithila* School. See *post* pp. 162, 163, and Precedents p. 454.

to the departed ancestors, the daughter's sons are considered as son's sons.—*Smri Chan.* Chap. X, Sect. ii, Cl. 15. Vide *Mit.* Chap. II, Sect. ii, § 6 and *Vi. Mi.* (*Sans.*) p. 205.

(*b*) "Where there exists no son or grandson.] This is indicative of the non-existence of heirs as far as the daughter.—*Vi. Mi.* (*Sans.*) p. 205.

Authority. MANU:—By that male child, whom a daughter, whether *formally appointed* or not, shall produce from a husband of the equal class, the maternal grandfather becomes the grandsire of a son's son (*c*): let that son give the funeral oblation and take inheritance.—*Mit.* In. Chap. II, Sect. ii, Para. 6.—*Vi. Mi.* (*Sans.*) p. 205.

(*c*) "The grandsire of a son's son"—by this it is intimated that as in default of a son, son's son takes the heritage of his paternal grandfather, so in default of a daughter, the daughter's son (inherits the property of his maternal grandfather).—*Vi. Mi.* (*Sans*) p. 205.

Authority. VRIHASPATI:—As the ownership of the father's wealth devolves on her (the daughter), although kindred exist, so her son likewise becomes the owner of his mother's (and) maternal grandfather's estate.—*Vi. Mi.* (*Sans.*) p. 205; *Vi. Chi.* (*Sans.*) p. 153. *Vide.* P. C. Tagore's translation, page 294.

Authority. As by means of the oblation cake offered by her son, a daughter inherits her father's estate, so by the presentation of the same oblation cake her son also becomes the owner of his maternal grandfather's estate, although kindred, that is, the father and the rest, exist. Such is the meaning.—*Vi. Mi.* (*Sans.*)p. 205.

Authority. MANU:—The son, however, of such a daughter, who succeeds to all the wealth of her father dying without a son, must offer two funeral cakes, one to his own father, and one to the father of his mother. Between a son's son and the son of such a daughter, there is no difference in law; since their father and mother both sprang from the body of the same man.—Chap. IX, *verses* 132, 133.

Here the equality contemplated between a son's son and a daughter's son must be understood to be an equality in

point of efficacy, both the sons being *in their nature*, unequal. There is no equality between them in point of clearing off the debts and inheriting the assets of the deceased; it being declared—"Debts must be paid by sons and sons' sons." Referring to a grandfather's property, it has further been declared—"The ownership of the father and son is the same in it. The superiority of a son's son being, by these texts, declared in respect of assets and debts, the equality contemplated by the text of NÁRADA, above quoted between a son's son and a daughter's son must be understood to consist in conferring benefits not temporal, that is, in the performance of *Sráddhas*; it being declared by VISHNU—"In offering oblations to the *manes*, the daughter's sons are considered as son's sons." The daughters, therefore, stand conspicuous in the line of succession by reason of their conferring benefits by means of their descendants.—*Smri. Chan.* Chap. XI, Sect. ii, Cl. 10.

Although (in the text of VRIHAT VISHNU, *ante*, p. 108) the father is said to inherit the property of a sonless man, in default of the daughter, yet, as reasons have already been shewn why the daughter's son should inherit in default of the daughter, it must be understood that the succession of a father does not come in until the failure of daughter's sons. It must further be noticed that a daughter's son being connected with the line of the daughter herself, a separate mention of him in the order of heirs was considered unnecessary by BRIHAT VISHNU.—*Smri. Chan.* Chap. X, Sect. iii, Cl. 10.

In the order of succession given in the *Mitákshará* and other books of paramount authority with the Benares, Mahrattah and *Drávida* schools, the daughter's son is placed immediately after the daughter. But the authorities of the *Mithilá* school are not of one opinion with respect to the succession of the daughter's son. In the *Kalpataru*, *Madana-párijáta* and *Smriti-sára* he (the daughter's son) is placed immediately after the daughter*; while according to the *Viváda-chintámani*, which is the paramount authority of the said school, the daughter's son succeeds after Remarks.

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* *Vide* Precedents, pp. 455—457.

the father. The passages (to that effect) of the latter work are as follows:—

"VRIHASPATI says:—'As the ownership of the father's wealth devolves on her, although kindred exist, so her son likewise is acknowledged to be heir to his maternal grandfather's estate.'"—*Vi. Chi.* p. 294.

"MANU says:—'Let the daughter's son take the whole estate of his own father, who leaves no *other* son, and let him offer two funeral oblations, the one to his own father, the other to his maternal grandfather.'"—*Ibid.*

These two texts obtain in default of mother and father. For the right of succession of wife, daughter, and others has been stated successively.—*Ibid.*

Accordingly in the summary of the heirs given in the above book (by its author) the daughter's son is placed after the father, and before the brother. The same runs thus:—

"Therefore, the summary of the above mentioned heirs is this:—first, the son; on failure of him, the grandson; in his absence, the grandson's son; on failure of him, a chaste wife; in her default, the daughters; in their absence, the mother; in her default, the father; in his default, the daughter's son; and in default of him, the brother" &c.—*Vi. Chi.* p. 299.

Thus according to the *Vivâda-chintâmani*, and, therefore, according to the prevailing doctrine of the *Mithilâ* school,—

Vyavasthá. **134.** The daughter's son succeeds on failure o the father.

Vyavasthá. **135.** If there be sons of more than one daughte they take *per capita*, and not *per stirpes*.*

Annotations.

135. If there be sons of more than one daughter, they t *per capita*, and not, as sons' sons do, *per stirpes*.—Macn. H. Vol. I, p. 23.

* *Vide* Precedents pp. 448 *et seq.*

Because the grandsons and great-grandsons (in the male line,) do alone take *per stirpes* on account of special texts;* while all other heirs take *per capita.*

In truth, the general rule regarding participation of heirs is to take *per capita;* the participation *per stirpes* or adjustment of the extent of rights and shares according to the number of fathers or mothers is an exception to it.

For instance, if there be two sons of one daughter, and three of another, five equal shares must be allotted, they shall not first divide the estate into two parts, and afterwards allot one share to each; for such a mode of distribution is only ordained in partition among the sons of sons: and the reasoning is not equal; for, a son's son, whose own father is dead, receives a share from his uncle; but the daughter's son, whose mother is deceased, does not receive a share from his mother's sister.—Coleb. Dig. Vol. III, page 501. Illustration.

SECTION IV.

ON PARENTS' SUCCESSION, &c.

With respect to the order in which parents succeed, the *Mitákshará,* the *Viváda-chintámani* and the other authorities of the Benares and Mithila schools, also the *Vyavahára-mayúkha,* the *Smriti-chandriká* and the other authorities of the *Mahratta,* and *Drávida* schools are not all of the same opinion(1). But,—

Annotations.

(1) BÁLAM BHATTA, the commentator of the *Mitákshará,* is of opinion, that the father should inherit first and afterwards the mother; upon the analogy of more distant kindred, where the paternal line has invariably the preference before the maternal kindred, and upon the authority of several express passages of law. NANDA PANDITA, author of commentaries on the *Mitákshará* and on the Institutes of VISHNU, had before maintained the same opinion.

* See *ante;* pages 94 and 95.

According to the prevalent doctrine of the Benares and Mithila schools,—

Vyavasthá. **136.** The estate of a man, who died separated from his co-parceners, and not subsequently re-united with them, devolves, in default of heirs down to the daughter's son, first on his mother, in default of her, on the father.*

Annotations.

But the elder commentator of the *Mitákshará*, VISHWESHWARA BHATTA has in this instance followed the text of his author in his own treatise entitled *Madana-párijáta*, and has supported VIJNYÁNESHWARA'S argument both there and in his commentary named *Subódhiní*. Much diversity of opinion does indeed prevail on this question. SRÍ-KARA maintains, that the father and mother inherit together: and the great majority of writers of eminence (as APARÁRKA, and KAMALÁKARA, and the authors of the *Smriti-chandriká, Madana-ratna, Vyavahára-mayúkha, &c.,*) gives the father the preference before the mother. But VÁCHASPATI MISRA, on the contrary, concurs with the *Mitákshará* in placing the mother before the father;† being guided by an erroneous reading of the text of VISHNU (*ante* p. 108,) as is remarked in the *Víra-mitrodoya*. The author of the latter work proposes to reconcile these contradictions by a personal distinction. If the mother (says he) be individually more venerable than the father, she inherits; if she be less so, the father takes the inheritance.‡—*Mit.* In. Chap. II, Sect. iii, § 5. Annotation.

136. In default of daughter's sons, the father inherits, according to the law as current in Bengal, but according to the other schools, the mother succeeds to the exclusion of the father.—Macn. H. L. vol. I, p. 25.

136. Although a great majority of writers gives the father the preference over the mother, yet according to the law as current in

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* *Vide* Precedents, pp. 289, 462—472.

† So does also CHANDESHWARA author of the *Viváda-ratnákara.*

‡ See *Víra-mitrodoya* (Sans.) p. 197.

On failure of those heirs,* the two parents, meaning the mother and the father, are successors to the property.—*Mit.* In. Chap. II, Sect. iii, § 1. Authority.

Although the order, in which parents succeed to the estate do not clearly appear (from the tenor of the text,†) since the conjunctive compound is declared to present the meaning of its several terms at once, and the omission of one term and the retention of the other constitute an exception to that complex expression, yet as the word 'mother' stands first in the phrase into which that is resolvable (2), and is the first in the regular compound [*mátá-pitarou*(3)] 'mother and father,' when not reduced (to the simpler form *pitarou* 'parents') by the omission of one and retention of the other; it follows from the order of the terms (4) and that of Authority.

Annotations.

Benares and in Mithila, the mother has the superior claim of inheritance.—Macn. H. L. vol. II, Chap. I, Sect. iii, Case 13. Note.

(2) *The word mother stands first in the phrase into which that is resolvable.*] The compound term, whether reduced to the simpler expression or retaining its complex form, is resolvable into the phrase *mátá cha pitá cha* 'both the mother and the father.' This however, is only the customary order of terms, not specially enjoined by any rule of Syntax. Annotation to *Mit.* Chap. II, Sect. iii, § 2.

(3) *Is first in the regular compound.*] Conformably with one of KÁTYÁYANA's emendatory rules on *Pánini's* canon for the collocation of terms in composition. (2. 2. 34.) That rule requires the most revered object to have precedence; and the example of the rule, as given in PÁTANJALI's *Mahábháshya* and VAMANA's *Kásika vritti*, is this very compound term *mátá-pitarou* 'mother and father.' The commentators, KAIYATA and HARA-DATTA, assign reasons why a mother is considered to be more venerable than a father.—*Ibid.*

(4) *It follows, from the order of the terms.*] The compound term *mátá-pitarou* 'mother and father,' as well as the abridged and

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* That is the heirs hitherto enumerated, namely, those down to the daughter's son.

† The text of YAJNÁVALKYA, *ante* p. 99.

the sense which is thence deduced and according to the series thus presented in answer to an inquiry concerning the order of succession, that the mother takes the estate in the first instance; and, on failure of her, the father.—*Mit.* In. Chap. II, Sect. iii, § 2.

Authority. Besides the father is a common parent to other sons(5); but the mother is not so: and, since her propinquity is consequently greatest, it is fit, that she should take the estate in the first instance, conformably with the text—" To the nearest *sapinda* the inheritance next belongs."*—*Mit.* In Chap. II, Sect. iii, § 3.

Authority. In default of the daughter, the mother succeeds,—according to the authority of VISHNU.—*Vi. Chi.* p. 293.

YÁJNYAVALKYA says:—" A wife, daughters, both parents *(b)*, brothers, their sons, kinsmen sprung from the same original stock, distant kindred, a pupil, and a fellow-student in theology: on failure of the first of these, the next in order

Annotations.

simpler expression *pitarou* 'parents,' is resolvable into the same phrase *mátá cha pitá cha* 'both the mother and the father.' Thus, in every form of expression, 'mother' stands first. Hence the author infers, that the mother's priority in regard to succession to wealth is intended by the text (*ante*, p. 99).—*Ibid.*

(5) *The father is a common parent to other sons.*] The mother is, in respect of sons, not a common parent to several sets of them: and her propinquity is therefore more immediate, compared with the father's. But his paternity is common; since he may have sons by women of equal rank with himself, as well as children by wives of the *Kshatriya* and other inferior tribes; and his nearness is therefore mediate, in comparison with the mother's. The mother consequently is nearest to her child; and she succeeds to the estate in the first instance, since it is ordained by a passage of MANU, that the person, who is nearest of kin, shall have the property. *Subódhini.*—Annotation to *Mit.* In. Chap. II, Sect. iii, § 3.

* MANU, Chap. IX, v. 187.

shares the estate of him who has gone to heaven leaving no male issue. This law extends to all classes."—*Vi. Chi.* page 295. See *ante*, page 99.

(*b*) *Both parents*] Here a doubt may arise as to the order of succession. To remove this, the following explanation will suffice; the mother, and on failure of her, the father, because this text has the same origin with that of VISHNU.—*Vi. Chi.* p. 295. So also the *Ratnákara.—Ibid.* Authority.

On failure of the daughter's son, none being more nearly related to the deceased than the father, the text "The estate of one who leaves no male issue is inherited by the father" here applies, and the wealth accordingly becomes inheritable by the father. Likewise, on this very occasion, none being more nearly related to the deceased than the mother, the text, "Of a son dying childless (and leaving no widow) the mother shall take the estate" also applies, and the wealth becomes inheritable by the mother. Therefore YÁJNAVALKYA says, "The wife and the daughters also, *both parents* (*pitarou*), brothers, &c."—The particle "*cha*" (also) used in the text, indicates that it is only after the daughter's son that the mother and the father simultaneously succeed to the estate. The opinion of YÁJNAVALKYA must be understood to be that there is no good ground for giving precedence to one over the other as between the parents.—*Smri. Chan.* Chap. XI, Sec. iii, Cl. 1, 2.

Therefore, an order in their succession must certainly be stated. We now proceed to state it. There being no reason for giving preference to one over the other, the precept alone must be relied upon in the matter. The law gives priority of succession to the father. VRIHAT VISHNU premising that the wealth of a sonless man goes to the widow, in her default to the daughter, says, "In her default, to the father, and, in his default, to the *mother*."*—*Smri. Chan.* Chap. XI, Sect. iv, Cl. 9. Authority for *Vyavasthá* 137.

Although in this passage the father is said to inherit the property of a sonless man in default of the daughter, yet, as reasons have already been shown why the daugther's son

* See *ante*, page 108.

should inherit in default of the daughter, it must be understood that the succession of a father does not come in until the failure of daughter's sons.—*Ibid.*, Cl. 10,

Therefore, according to the *Smriti-Chandriká*,—

Vyavasthá. **137. The father inherits on failure of the daughter's son, and the mother on failure of the father.**

According to the *Vyavahára-mayúkha* also—

Vyavasthá. **138. The father inherits in default of the daughter's son, and the mother on failure of the father.**

Authority. In default of the daughter's son, comes the father; in default of him, the mother; so (says) KÁTYÁYANA: "The widow, being a woman of honest family, or the daughters, or on failure of them, the father, or the mother, or the brother, or his sons, are pronounced to be the heirs of one who leaves no male issue:" and likewise VISHNU: "The wealth of him who leaves no male issue, goes to his wife; on failure of her, it devolves on daughters; in default of daughters, it devolves on the daughters' sons; if there be none, it belongs to the father; if he be dead, it appertains to the mother; on failure of her, it goes to the brothers, after them it descends to the brother's sons, if none exist, it goes to the relations [*sakulya*]"—*Vyav Mayú* Chap. IV, Sect. viii, § 14.

As for the opinion of VIJNÁNESHRA—"that in the complex term 'parents,' the omission of one term and retention of the other [*eka-shesha*] constitutes an exception to the regular compound [*dwandwa*], and although the order [of construction] be not certainly defined, yet the meaning [in favor of the mother's priority] may be understood, because the word 'mother' stands first in the proper form of the compound; also, from the consecutive order of the particular compound ['mother and father'] being the rule, of which the omission of one term and retention of the other ['parents'] is the exception, and since the father is a common parent to many sons, whilst the mother is not so; therefore, of the two, the mother in the first instance takes

the estate, and on failure of her, the father," it must be set aside, as contrary to those texts: for the word 'mother' being placed first, in the proper form of the compound, is an exception to the general rule, in regard to the option allowed for the omission of one term and retention of the other; and, further, there is a want of proof, in fixing the proper order according to the diffusion or condensation [of the parental power].—*Ibid.* § 15.

139. The mother also, if unchaste, is not entitled to inherit.* *Vyavasthá.*

As the term *patní* (widow) is employed with a general import embracing any female entitled to inheritance, and as an adulterous wife or widow has no heritable right, *a fortiori* the unchaste mother has no such right, her right being weaker than that of a widow.† **Reason.**

140. The mother too without a legal necessity or any of the acts, religious or secular, mentioned in widow's succession,‡ is incompetent to alienate her son's heritage, which, after her enjoyment and demise, is to be inherited by the next heirs of her son.§ *Vyavasthá.*

Because the mother's heritable right being posterior to, and her claim weaker than, that of the widow, *a fortiori* she is under the same restrictions as are imposed upon the widow, and can have only such liberties as are granted to her.|| **Reason.**

141. According to the doctrine of the Mithila School, and the opinions of the High Courts of Madras and Bombay, the mother has absolute right *Vyavasthá.*

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* See the case of *Mussummat Deokee* v. *Sookhdeo*. 2 N. W. Pr. H. C. Rep. p. 361. Norton's Leading Cases, Part II, p. 428.

† *Vide* Precedents, pp. 417, 424, 427, 433, 435.

‡ See *ante*, pp. 122—144.

§ *Vide* 1 Macn. 25,—1 Stra. 144, and Precedents, pp. 417, 418, 462—472.

|| See *ante*, pp. 157, 158 and Precedents, pp. 417, 424—427, 433, 435, 462—472.

in, and power over, the movables, but not over the immovables, inherited by her.*

Authority. As a woman cannot make a present of, or at pleasure dispose of, immovable property given to her by her husband in his life-time, so also she cannot dispose of any immovable property which she inherits at his death. The same opinion is maintained in the *Ratnákara* and *Prakásha-kára*. If the mother on the death of her son, get his immovable property, she cannot make a gift of it, or dispose of it at her pleasure.—*Vi. Chi.* p. 263.

Authority. MISRA† also asserts, that she (the mother) has no power to give away, or otherwise alien, the property which devolved on her by failure of nearer heirs. This lawyers affirm to be the settled rule.—Coleb. Dig. Vol. III, p. 506.

Vyavasthá. **142. A step-mother is not entitled to inherit from her step-son.‡**

Reason. Because the *dicta* of the *Mitákshará* and other authorities with respect to a mother (*ante*, pp. 105, 106) are applicable to one's own mother, and not to his step-mother.

Moreover, since the relation between a step-son and step-mother exists only through the father, and, as such, she is remoter than, and inferior to, the father, she cannot be included in the term mother (*mátá*) who, as already shown, is much nearer than, and superior to, the father§; and as the step-mother does not and cannot confer the great benefit as does the natural mother whose propinquity is held to be far greater, and who herself is much more venerable, than the father§, the step-mother has no pretensions to inherit from

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* *Vide* Pecedents, pp. 272—274, 467.

† MISRA, that is VÁCHASPATI MISRA, author of the *Viváda-chintámani.*

‡ *Vide* 1 Stra. 144 and Precedents, p. 653.

§ *Vyása* :—" Ten months the mother bore her infant in her womb, suffering extreme anguish fainting with travail and various pangs, she brought forth her child. Loving her son more than her life, the tender mother is (justly) revered : who could repay her even though he tried a hundred years!" MANU also :—" A mother surpasses and thousand fathers, for she bears the child in her womb, and nourishes it ; therefore is a mother most venerable."

her step-son. Besides the law has ordained the succession of the natural mother alone, and not also of the father's wife. (See partition).

SECTION V.

ON THE SUCCESSION OF A BROTHER, HIS SON AND SON'S SON.

143. In default of parents, the brother takes the heritage of his brother. *Vyavasthá.*

YÁJNAVALKYA:—"The wife, and the daughters also, both parents, brothers likewise," &c. *Ante* p. 99. Authority.

On failure of the father, brethren share the estate. Accordingly MANU says,—"Of him who leaves no son, the father shall take the inheritance or the brothers."—*Mit.* In. Chap. II, Sect. iv, § 1. *Vi. Chi.* p. 295. Authority.

The right of succession of the brother has been settled by the authority of VISHNU (*ante*, p. 108). On this subject GOUTAMA says, "The wealth of deceased brothers goes to the eldest."—*Vi. Chi.* p. 295. Authority.

On failure of parents, brothers take the inheritance. *Vi. Mi.* (*Sans.*) p. 207. Authority.

Annotations.

143. In default of father and mother, brothers inherit.†—Macn. H. L. Vol. I, p. 26.

MANU:—A mother surpasses a thousand fathers, for she bears the child in her womb, and nourishes it; therefore is a mother most venerable. A (mere) *A'chárgya* surpasses ten *Upádhyáyas*; a father, a hundred such *Achárgyas*; and a mother, a thousand (natural) fathers.—*Vide V. D.* pages 187—188. Note.

* *Vide* precedents, pp. 473—475, 479.

† After this, Sir W. Macnaghten gives the order of succession of brothers living in the state of reunion which in this work will be given in its proper place; that is in the chapter on Reunion.

Vyavasthá. **144. Among brothers, such as are of the whole blood inherit in the first instance.***

Authority. Among brothers, such as are of the whole blood take the inheritance in the first instance, under the text cited :—(*Viz.*) "To the nearest *sapinda*, the inheritance next belongs." (MANU, 9. 187). Since those of the half-blood are remote through the difference of the mothers.—*Mit.* Chap. II, Sect. iv, § 5.

Authority. In default of the mother the uterine brother (inherits) *Vyav. Máyú.* Chap. IV, Sect. viii, § 16.

Authority. On failure of the mother, the property devolves on the uterine brother, his propinquity to the deceased being greater by reason of both of them having been born of the same mother.—*Smri. Chan.* Chap. XI, Sect. iv, Cl. 1.

Authority. "Both parents, brothers likewise."† Here the word "brothers" refers in the first place to uterine brothers, they being more nearly related to the deceased than a half-brother.—*Smri. Chan.* Chap. XI, Sect. iv, Cl. 3 & 4.

Authority. The rule of YÁJNAVALKYA hence is, that the wealth of a sonless man goes, on failure of his mother, to a uterine brother. The same author, by the use of the general term "brothers," while the mention of only "a uterine brother" would have been sufficient, must be understood to have laid down the further rule that, in default of a uterine brother, a brother of the half-blood, that is, by a different mother, succeeds. There are, however, exceptions to the above rule in two instances, which will be presently noticed.—*Smri. Chan.* Chap. XI, Sect. iv, Cl. 5.

Vyavasthá. **145. In default of the whole brother the half-brother (*viz.*, brother by a different mother) inherits from his half-brother (deceased.)‡**

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* *Vide* precedents, pp. 474, 479.

† YÁJNAVALKYA, see *ante* p. 99.

‡ *Vide* Precedents, pp. 474, 479.

If there be no uterine (or whole) brothers, those by different mothers inherit the estate.—*Mit.* In. Chap. II, Sect. iv, Para. 6. Authority.

The word "brothers" being used in the general sense, the brothers by different mothers inherit on failure of brothers by the same mother. This is clearly declared by SANGRAHA-KÁRA who says:—"Where there are two kinds of brothers, one of the whole blood and the other of the half-blood, the brothers of the whole blood take the inheritance to the exclusion of those of the half-blood." This passage is to be countenanced as founded on sound reason.—*Smri. Chan.* Chap. XI, Sect. iv, Cl. 25. Authority.

On failure of the uterine brother, the wealth goes to the half-brother or brother by a different mother.—*Smri. Chan.* Chap. XI, Sect. iv, Cl. 2. Authority.

146. According to the *Smriti-chandriká*,—by consent of the mother, the brother may inherit before her; and where a grandmother exists, she inherits after the mother, and before the brother. *Vyavasthá.*

The passages to the above effect are as follow:—

"If a divided member should die, his wealth, in default of male issue, will be taken by the father, or brother, or mother, or then [*atha*] father's mother (*a*) in due order."—*Smri. Chan.* Chap. XI, Sect. IV, Cl. 6.

(*a*) "Father's mother] Mother of the father of the deceased divided son, or, in other words, his grandmother."—*Ibid.*

"The phrase 'In default of male issue' has been used to denote the failure of persons more nearly related to the deceased than the father. The meaning hence is that, in default of heirs ranging from the son to the daughter's son, who are more nearly related to the deceased than the father, by reason of their conferring on him benefits temporal and spiritual, the father takes the estate in the first instance."—*Ibid.*, Cl. 7.

"The particle "*Vá*" [or] which has been thrice used in the above passage, indicates an alternative and has reference to defaults occurring among heirs; a vested interest such as '*Swámyamam*' [ownership] not being capable of existing at one and the same time in one or the other of the heirs [enumerated] indiscriminately on the principle that a thing cannot have an indeterminate existence."—*Ibid.*, Cl. 8.

"Hence, the substance of the passage is this. In default of the father, the brother inherits; in default of him, the mother; in default of her, the grandmother. The phrase 'In due order' used in the passage, means in the order stated."—*Ibid.*, Cl. 9.

"MANU, too, likewise, in the instance of a deceased divided member, having by the use of the phrase 'without male issue' adverted to the absence of a son, widow, daughter, and daughter's son, who are all more nearly related to the deceased, propounds the succession of the father, brother, mother and grandmother by a *shloka* and a half. 'Of him who leaves no son, the father shall take the inheritance, or the brothers. Of a son who dies without issue (*b*), the mother shall take the inheritance, and the mother also being dead, the father's mother shall take the heritage'."—*Ibid.*, Cl., 10.

(*b*) "The phrase 'without issue' is here indicative of the absence of the son, widow, daughter, and daughter's son"—*Ibid.*, Cl. 11.

Authority. "VRIHASPATI, however, by the following passage, reconciles the inconsistency between the texts of KÁTYÁYANA and MANU, and that of YÁJNAVALKYA, by pointing out the case in which a brother takes the succession prior to a mother as laid down in the texts of KÁTYÁYANA and MANU. "Of a deceased son who leaves neither widow (*c*), nor male issue, the mother must be considered as heiress, or *by her consent the brother may inherit*."—*Ibid.*, Cl., 14.

(*c*) "The term 'widow' comprehends by synecdoche the daughter, daughter's son, and father, who constitute the series of heirs prescribed in the text of YÁJNAVALKYA

founded on reasoning. It must, therefore, be understood that the son referred to in the above text of VRIHASPATI is one that dies leaving no son, widow, daughter, daughter's son, or father."—*Ibid.*, Cl. 15.

"The conclusion hence is, that the consent of the mother and the existence of the grandmother are the two instances in which exceptions to the rule contained in the passage 'Both parents, brothers likewise,' are to be observed in the manner laid down in the texts of KÁTYÁYANA and MANU."—*Ibid.*, Cl. 16. Conclusion.

147. In default of brothers of the whole and half-blood, brothers' sons inherit from their deceased uncle.* *Vyavasthá.*

According to the text of YÁJNAVALKYA; "The wife, and the daughters also, both parents, brothers likewise, and their sons, &c." (*Ante* p. 99.) Authority.

In default of brothers, their sons,—that is brothers' sons—share the heritage.—*Vi. Mi.* (Sans.) p. 208. Authority.

148. Among them also, the whole brother's son inherits in the first instance, failing him the half brother's son.† *Vyavasthá.*

On failure of brothers also, their sons share the heritage in the order of the respective fathers.—*Mit.* In. Chap. XI, sect. IV, § 7. Authority.

In the case of brother's sons also, the same rule applies where there is competition between the son of a brother of the whole blood and the son of a brother of the half-blood. Therefore on failure of the son of a uterine brother, the son of a brother by a different mother takes inheritance. —*Smri. Chan.* Chap. XI, Sect. IV, Cl. 36. Authority.

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* *Vide* Precedents, pp. 474, 475, 480.

† *Vide* Precedents, pp. 474, 475.

Authority. Among brother's sons also the succession is regulated according to the greatness of propinquity: the whole brother's sons inherit in the first instance, failing them, half-brother's sons. This is proper: since a half-brother's son omitting the mother of (his deceased uncle) the late proprietor, presents the oblation cake to his grandfather in conjunction with his own grandmother: thus he being inferior to the whole brother's son, is entitled to succeed only in default of the latter.—*Vi. Mi.* (Sans.) p. 208.

But the author of the *Vivâda-chintâmani* without making any distinction between the brothers of the whole and half-blood, and also between the sons of such brothers, has only said: "In default of the daughter's son, the brother; in his default, the brother's son."—See *Vi. Chi.* page 299.

According to the *Vyavahâra Mayúkha*,—

Vyavasthá. **149. In default of the uterine brother his son inherits, and not the brother of the half-blood, and in default of the uterine brother's son, the gentile relations (*gotraja*) succeed.**

The passages to the above effect are as follow:—

Authority. "In default of the mother, the uterine brother, in his default, his son. As for the declaration of VIJNÁNESHWARA and others, that 'in default of the uterine brother, those by different mothers succeed; and on failure of them the sons of the uterine brother', it is wrong: since the term 'brother' has the force of 'whole brother,' and a secondary quality is implied by the term 'brother by another mother;' and hence an exposition in favor of both is contrary (to reason.) In default of brother's sons, the gentile relations succeed (*gotraja*)."—*Vyav. Mayú.* Chap. IV, Sect. viii, § 16 & 18.

Some, however, say, upon the term 'brothers:' that since, "brothers and sisters, with sons and daughters," is one of the maxims [of *Pánini*,] and the term 'brothers and sisters,' resolves into [the complex term] 'brothers,' by the omission of one term and retention of the other, in a compound of two species; therefore, in default of brothers, the sister [succeeds]:' But it is not so, because there is a

want of proof [of the correctness] of omitting one term, and retaining the other, in a compound of two species. —*Vyav. Mayú.* Chap. IV, Sect. viii, § 16.

150. In case of competition between brothers and nephews, the nephews have no title to the succession: for their right of inheritance is declared to be on failure of brothers.*—*Mit.* In. Chap. II, Sect. iv, § 8. *Vyavasthá.*

Consequently the whole brother's son has no right to inherit while there exists even a half-brother.

151. If the sons of brothers be numerous, they take *per capita*, and not *per stirpes*.† *Vyavasthá.*

152. However, when a brother has died leaving no male issue (nor other nearer heir), and the estate has, consequently, devolved on his brothers, indifferently, if any one of them die before a partition of their brother's estate takes place, his sons do, in that case, acquire a title through their father: and it is fit, therefore, that a share should be allotted to them in their father's right, at a subsequent distribution of the property between them and the surviving brothers.—*Mit.* In. Chap. II, Sect. iv, § 9. *Vyavasthá.*

The following passage of the *Vyavahára-Mayúkha* is to the like effect:—

"The sons of a brother, also, if themselves not fatherless at the time of the paternal uncle's death, provided they are capable of understanding (the use of) property, will divide the father's share with their father's other brothers, after the example: "Among grandsons by different fathers, the allotment of shares is according to the fathers."—*Vyav. Mayú.* Chap. IV, Sect. viii, § 17.

So also Mitra Misra. See *Víra-mitrodoya* (Sans.) page 208.

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* *Vide* Precedents, pp. 474, 475.
† See *ante* page 163 and 1 Stra. H. L. p. 145.

Although the heritable right of the brother's grandson has not been clearly mentioned in the *Mitákshará* and other digests in *Sanskrit*, yet it has been determined that—

Vyavasthá. **153. A brother's grandson succeeds in default of a brother's son.***

Because the term 'brother's son,' is inclusive also of the brother's grandson,† and because he is a *sapinda* and the nearest of the persons understood by the term *gotraja* (gentiles).

SECTION VI.

ON THE SUCCESSION OF *gotraja*, OR GENTILES.‡

In the order of succession of heirs down to a brother's son there is (except in three instances)§ no discrepancy among the books of the Benares and the other Schools; the succession of gentiles (*gotraja*) in default of heirs as far as a brother's son is also recognised in all of them. But there is among them a great discrepancy in the enumeration of the persons termed *gotraja* as well as in their order of succession (1).

Annotations.

(1.) The scholiast of VISHNU, who is also one of the commentators of the *Mitákshará*, states otherwise the succession of the near and distant kindred, in expounding the passage of VISHNU

* *Vide* Precedents, pp. 475—478, see also page 501.

† It may be asked that when in law, the term son (*put-tra*) is inclusive of the grandson and great-grandson (see *ante* p. 19) why then the term 'brother's son' does not here include also the brother's great-grandson? The answer is, that (in law) calculation is made from the son of the common ancestor, which here is the father of both the deceased and his brother, consequently the term "son" (of that ancestor) is inclusive of his great-grandson, who is the brother's grandson.

‡ *Gotraja*, or gentiles are persons sprung from the same general family (*gotra*) distinguished by a common name: these answer nearly to the gentiles of the *Roman* law.

§ That is in the succession of daughter's son, parents, brothers and their sons. See *ante*, pp. 162, 164—168, 172—176.

For instance in the *Mitákshará* and many other books, which are prevalent authorities in the Benares school, the

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Annotations.

"if no brother's son exist, it passes to kinsmen *(bandhus;)* in their default, it devolves on relations *(sakulyas):*" where Bálam-bhatta, on the authority of a reading found in the *Madana-ratna*, proposes to transpose the terms *bandhu* and *sakulya;* for the purpose of reconciling Vishnu with Yájnavalkya, by interpreting *sakulya* in the sense of *gotraja* or kinsmen sprung from the same family. Nanda Pandita, preserving the common reading, says "kinsmen *(bandhu)* are *sapindas;* and these may belong to the same general family or not. First those of the same general family *(sagotra)* are heirs. They are three, the father, paternal grandfather, and great-grandfather; as also three descendants of each. The order is this: In the father's line, on failure of the brother's son, the brother's son's son is heir. In defult of him, the paternal grandfather, his son and grandson. Failing these, the paternal great grandfather, his son and grandson. In this manner the succession passes to the fourth degree inclusive, and not to the fifth: for the text expresses 'The fifth has no concern with the funeral oblations.' The daughters of the father and other ancestors must be admitted, like the daughter of a man himself, and for the same reason. On failure of the father's kindred connected by funeral oblations, the mother's kindred are heirs: namely the maternal grandfather, the maternal uncle and his son; and so forth. In default of these, the successors are the mother's sister, her son and the rest."

The Commentator takes occasion to censure an interpretation, which corresponds with that of the *Mitákshará* as delivered in the following section (S. 6 § 1.); and according to which the cognate kindred of the man himself, of his father and of his mother are the sons of his father's sister and so forth: because it would follow, that the father's sister's son and the rest would inherit, although the man's own sister and sister's sons were living. Bálam-bhatta, however, repels this objection by the remark, that the sister and sister's sons have been already noticed as next in succession to the brother and brothers sons: which is indeed Nanda Pandita's own doctrine.

[illegible] [illegible] [illegible], (viz., paternal grandmother and the rest have been placed among the *gotrajas*, or gentiles; while in the *Vivâda-chintâmani*, prevalent in the Mithila school, the succession of the paternal grandmother and the rest has not been mentioned. Then in the *Smriti-chandriká*, the paramount authority of the *Drávida* school, the paternal grandmother and the rest having been expressly excluded from the list of the gentile heirs, upon the ground of their not being comprehended in the term *gotraja* which is of the masculine gender, the succession of only the male *gotrajas* has been recognized; and in the *Vyavahára-mayúkha*, which is prevalent in the Mahratta school, the sister and step-brother have been included among the *gotrajas* or gentiles.

The subjoined are the orders of succession according to the above-mentioned authorities.

Annotations.

He adds, 'after the heirs above mentioned the *sakulya* or distant kinsman is entitled to the succession : meaning a relation in the fifth or other remoter degree.'

This whole order of succession, it may be observed, differs materially from that which is inculcated in the text of the *Mitákshará*. On the other hand, the author of the *Víra-mitrodoya* has exactly followed the *Mitákshará* ; and so has Kamalákara : and it is also confirmed by Mádhava A'chárya, in the *Vyavahára-Mádhava*, as well as by the *Smriti-chandriká*.

But the author of the *Vyavahára-mayúkha* contends for a different series of heirs after the brother's son : '1st the paternal grandmother ; 2nd the sister ; 3rd the paternal grandfather and the brother of the half-blood, as equally near of kin ; 4th the paternal great-grandfather, the paternal uncle and the son of a brother of the half-blood, sharing together as in the same degree of affinity.' He has not pursued the enumeration further ; and the principle stated by him, nearness of kin, does not clearly indicate the rule of continuation of this series.—*Mit.* In. Chap. II. S. v. § 5. Annotation.

According to the prevalent doctrine of the Benares school:—

154. In default of a brother's son, the gentiles take the inheritance.* *Vyavasthá.*

If there be not brother's sons, the gentiles (*a*) share the estate.—*Mit.* In. Chap. II, Sect. v, § 1. Authority.

(*a*) The gentiles are the paternal grandmother and relations connected by funeral oblations of food and libations of water.—*Ibid.*

In default of brother's sons, the gentiles succeed—they are taken to be relations besides the father, brothers and his son: They are the paternal grandmother, the *sapíndas* or kinsmen connected by funeral oblations of food and *samánodakas* or kismen allied by a common libation of water.—*Vi. Mi.* (*Sans.*) p. 208.

155. Of the gentiles, the grandmother inherits in the first instance. *Vyavasthá.*

In the first place, the paternal grandmother takes the inheritance.—*Ví. Mi.* (*Sans.*) p. 208. Authority.

In the first place the paternal grandmother takes the inheritance.—*Mit.* In. Chap. II, Sect. v, § 2. Authority.

The paternal grandmother's succession immediately after the mother, was seemingly suggested by the text before cited, "And, the mother also being dead, the father's mother shall take the heritage:" no place, however, is found for her in the compact series of heirs from the father to the nephew: and that text ("the father's mother shall take the heritage") is intended only to indicate her general competency for inheritance. She must, therefore, of course succeed immediately after the nephew; and thus there is no contradiction.—*Ibid.*

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* *Vide* Precedents, pp. 492—502.

Vyavasthá. **156.** On failure of the paternal grandmother, the paternal grandfather and the rest inherit the estate.

Authority. On failure of the paternal grandmother, the (*gotraja*) kinsmen sprung from the same family with the deceased and (*sapinda*) connected by funeral oblations, namely the paternal grandfather and the rest, inherit the estate. For kinsmen sprung from a different family, but connected by funeral oblations, are indicated by the term cognate (*bandhu* Sect. 6.)—*Mit.* In. Chap. II, Sect. v, § 3.

Vyavasthá. **157.** In default of the paternal grandmother, the paternal grandfather inherits, failing him, the paternal uncle, in his default, his son.

Authority. On failure of the father's descendants the heirs are successively the paternal grandmother, the paternal grandfather, the uncles, and their sons.—*Mit.* In. Chap. II, Sect. v, § 4.

Authority. On failure of the father's descendants, the heirs are successively the paternal grandmother, the paternal grandfather, the uncles and their sons.—*Vi. Mi.* (Saus.) p. 209.

Vyavasthá. **158.** On failure of the paternal grandfather's line, the paternal great-grandmother, the paternal great-grandfather, his son and son's son successively inherit;—in default of them, the paternal great-grandfather's mother, great-grandfather's father, grandfather's uncle and his son successively;—on failure of them, the paternal great-grandfather's grandmother, great-grandfather's grandfather, great-grandfather's uncle and his son;—in their default, the paternal great-grandfather's great-grandmother, great-grandfather's great-grandfather, great-grandfather's grand-uncle and his son.*

* *Vide* Precedents, pp. 492—502.

On failure of the paternal grandfather's line, the paternal great-grandmother, the great-grandfather, his sons and their issue, inherit. In this manner must be understood the succession of kindred belonging to the same general family and connected by funeral oblations up to the seventh [degree (*a*)]*—*Mit.* In. Chap. II, Sect. v, § 5. Authority.

(*a*) *In this manner must be understood the succession of kindred belonging to the same general family and connected by funeral oblations up to the seventh degree.*] The *Subodhinî*† has given the detailed enumeration of *sapindas* after the paternal great-grandfather's descendants:—*viz.*, the paternal great-grandfather's mother, great-grandfather's father, great-grandfather's brothers and their sons. The paternal great-grandfather's grandmother, great-grandfather's grandfather, great-grandfather's uncles and their sons. The great-grandfather's great-grandmother, great-grandfather's great-grandfather, his sons and their sons.—*Vide* Annotation 5, at page 350 of the *Mitâksharâ*.

On failure of the paternal grandfather's line, the paternal great-grandmother, the paternal great-grandfather, the paternal grandfather's brother, and nephew. In this manner must be understood the succession of kindred belonging to the same general family and connected by funeral oblations of food up to the seventh degree.—*Vi. Mi.* (Sans.) page 209. Authority.

Although the heritable right of the great-grandsons of the ancestors is not mentioned in the *Mitâksharâ* and several other treatises, yet the same has been very properly established by the British Dispensers of justice, because the great-grandson directly presents the oblation cake in the *Párvana*, and because the term "son" signifies also the grandson and great-grandson in the male line.—See *ante*, pp. 18, 19, and Precedents, pp. 58, 477, 493—502.

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* Here the learned Translator has, perhaps inadvertently, omitted to render the Sanscrit word "*á-saptmât*," which is in the original, and the translation of which is "up to the seventh" which is the end of the degrees of *sapindas* or relations connected by funeral oblations of food as will be presently seen in the description of *Sapindas* and in many other places.

† A commentary on the Mitâksharâ by Bishweshara Bhatta.

Vyavasthá. **159.** **On failure of them, the *samánodakas* or kindred connected by libations of water inherit according to the proximity of degree.***

Authority. If there be none such, the succession devolves on kindred connected by libations of water: and they must be understood to reach to seven degrees beyond the kindred connected by funeral oblations of food: or else, as far as the limits of knowledge as to birth and name extend. Accordingly VRIHAT MANU says: The relation of the *sapindas* or kindred connected by the funernal oblation, ceases with the seventh person and that of *samánodakas*, or those connected by a common libation of water, extends to the fourteenth degree; or as some affirm, it reaches as far as the memory of birth and name extends. This is signified by *gótra* or the relation of family name."—*Mit.* In. Chap. II, Sect. v, § 6.

Authority. In default of the *sapindas* or kindred connected by oblations of food, the *samánodakas* or kindred connected by libation of water inherit: and they are seven beyond the *sapindas.*—*Vi. Mi.* (Sans.) p. 209.

Authority. The *samánodakas* also inherit according to the proximity of degree.—*Vi. Mi.* (Sans.) p. 209.

According to the doctrine prevalent in the Mithila school,—

Vyavasthá. **160.** **In default of the brother's son the nearest kinsmen; in default of them, the remotest kindred according to their order; in default of all these, the nearest *sakulya*; on failure of them, the remotest *sakulya*† (inherit)—*Vi. Chi.* p. 299.**

The author of the *Smriti-Chandriká* says,—"If it be asked—who succeeds if there be not even brother's sons, YÁJNAVALKYA says: '*Gotraja* (gentiles) or kinsmen sprung from the same family with the deceased.' Add

* *Vide* Precedents, pp. 492—502.

† Here by the term "the remotest *sakulya*" are to be understood *Samánodakas* or kindred connected by a common libation of water.

here 'take the inheritance.' The term '*gotraja*' (though general in its signification) excludes the father, brother and his son, who have already been separately noticed, and comprehends the son of the grandfather and such other persons as are sprung from the same family. The term '*gotraja*' farther excludes the daughter of the grandfather and the like females, it being *primâ facie* a complex of two plural terms [*gotrajah cha, gotrajah cha* "gentiles and gentiles"] of the masculine gender formed by omitting one and retaining the other. *Gotraja*, according to Sanskrit Grammar, admits also of the assumption that it is a complex of two terms of different genders, but for such an assumption, the context must afford a special ground, as in the instance of the following, "Fetch *kukkutou* [fowls]. Let me cause them to have sexual intercourse." Here, however, there exists no such special ground. On the contrary, the term 'gotraja' being used in the text of YÁJNAVALKYA, after the words "brothers likewise and their sons" both of which denote *males*, must be concluded to mean male *gotraja* only and not females.'—*Smri. Chan.* Chap. XI, Sect. V, Clause 1 & 2.

"Again, referring to the *Sruti* 'Females and persons deficient in an organ of sense or member are deemed incompetent to inherit,' [which *Sruti*, as already noticed, is applicable to females not being a widow, daughter, or the like, whose right to inheritance has been expressly declared by law], it [the *Sruti*] will be found reconcilable with the conclusion that the complex term 'gotraja' is a compound of two terms of the masculine gender. Whereas, if 'gotraja' were considered to consist of two terms of different genders, namely, the masculine and feminine, such a construction would be opposed to the purport of the Sruti. The latter construction is therefore set aside."—*Ibid.*, Cl. 2.

"Accordingly, BHÁSHYA-KÁRA, the commentator of the *sútrah* or aphorisms of APASTAMBA, construes the *sútrah* : "The father, being alive, distributed his heritage among his sons [*putrebhyah*]," as signifying that heritage was distributed among the sons alone and not among the daughters also, these being females."—*Ibid.*, Cl. 4.

"Under the rule of Grammar 'Brothers [*bhrátarou*] and sons [*putrou,*] with sisters and daughters,' the terms

'*duhita cha* and *putrák cha*' [daughter and son] form the complex term '*Putrou*' [sons], by the omission of one term and retention of the other of the regular compound of two species. Though, accordingly, by supposing that the complex word '*putrák*' [sons] in the phrase 'Among his sons [*putrebhyah*]' used in the aphorism above quoted, comprises two terms of two different genders, namely, daughter and son, it is practicable to construe the passage in question as implying that heritage was distributed among daughters also, yet such a construction is to be rejected as opposed to the principle that males alone are competent to inherit and not females, inculcated by the *Sruti*, "Females and persons deficient in an organ of sense or member are deemed incompetent to inherit.'"—*Smri. Chan.* Chap. XI, Sect. V, Cl. 5.

"Some say: 'gotraja [gentiles] are the ***paternal grandmother*** and relations connected by funeral oblations of food [*sapindas*] and relations connected by libations of water [*samánodakas*]. In the first place, the grandmother takes the inheritance. The paternal grandmother's succession, immediately after the mother, was seemingly suggested by the text—'And the mother also being dead, the father's mother shall take the heritage'; no place however is found for her in the compact series of heirs from the father to the nephew. She must therefore, of course, succeed immediately after the nephew, and thus there is no contradiction.' This is not right. Even after the nephew, there is no place to be found for the grandmother, the term 'gotraja' ***immediately*** following the term nephew in the compact series of heirs, and that term referring, as above noticed, to ***male gotraja.*** Besides, *gotraja* (in Sanskrit) means persons sprung from the same family. But a grandmother is not one sprung from the same family with the deceased. She was born in a different family and had connection with the family of the deceased, only by marriage. She can not hence be called a '*gotraja.*' This much is sufficient to refute the opinion above quoted."—*Smri. Chan.* Chap. XI, Sect. V, Cl. 6.

"YÁJNAVALKYA, it must be understood, has used in his text the term '*gotraja*' in the form of a conjunctive compound, as he has done the term '*pitarou*' [parents] in the same passage. This is because, as between both the parents,

he saw no ground for giving precedence to one over the other, so he found no reason among *gotrajas* for selecting one in preference to another. For instance, in declaring that, in default of a brother's son, the son of the grandfather succeeds, what reason could there be? None."—*Ibid.*, Clause 7.

"The objector here asks who has declared a grandfather's son entitled to inheritance in supersession of a grandfather? The reply is, that YÁJNAVALKYA himself must be presumed to have so declared by his having used in his passage the term '*gotraja*,' [gentiles] immediately after the phrase 'brothers likewise and their sons.' The separate mention of brothers and their sons while they are comprehended in the term '*gotraja*,' is indicative of the rule that, of the descendants severally belonging to the grandfather and others, only two, namely, the son and the grandson, are entitled to inheritance, as is the case with the descendants of the father."—*Ibid.*, Cl. 8.

"MANU, too, propounds the same principle:—'Whoever is the next in the line of kinsmen [*sapinda*], to him the inheritance belongs. On failure of such kindred, the distant kinsman [*sakulya*] shall be the heir, the spiritual preceptor or the pupil.'"—*Smri. Chan.* Chap. XI, Sect. V, Clause 9.

"On the strength of the above explanation, it must be concluded that those who declare that, after the brother's son, the grandfather succeeds, that on failure of him, his descendants take, and that a similar rule is to be observed in the case of the great-grandfather and others, are ignorant of the true meaning of the text, (para. 9,) inculcating an order of succession different from that ordained by the text founded on reasoning."—*Smri. Chan.* chap. XI, Sect. V, Clause 11.

Consequently,—

"*According to the doctrine prevalent in the Drávida School*,—

161. The order of succession stands as follows:— On failure of a brother's son, the son of the paternal *Vyavasthá.*

grandfather succeeds, on failure of him, his son; on failure of him, the son of the paternal great-grandfather, on failure of him, his son; on failure of him, the son of the great-great-grandfather, on failure of him, his son; on failure of him, the son of the father of the great-great-grandfather, on failure of him, his son; on failure of him, the son of the last *sapinda,** on failure of him, his son; on failure of him, the son of the first *samánodaka,*† on failure of him, his son. A similar rule is to be observed in regard to the succession of the descendants of each of the *six*‡ *samánodakas* of the higher grade.—*Smri. Chan.* Chap. XI, Sect. V, Clause 12.

VRIHASPATI bearing in mind all the above principles declares,§—

Vyavasthá. **162.** "Where there are many relatives (*jnátayah,*) remote kindred (*sakulyáh,*) and cognate kindred (*bándhaváh,*) whoever is the nearest of them, shall take the wealth of him who dies without male issue."—*Ibid.*, Cl. 13.

Jnátayah] *Sapindas* or kinsmen connected by funeral oblations of food.—*Ibid.*

Sákulyah] *Samánodakas* or distant kinsmen connected by libations of water.—*Ibid.*

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* *A Sapinda* is a kinsman connected by oblations of food. See post.

† A *Samánodaka* is a kindred allied by libation of water and is more remote than a *sapinda* or *sakulya*.

‡ Here the learned Translator of the *Smriti-chandrika* has used the word '*five*,' but I do not know how that can be, since the *samánodakas* are of seven degrees from the eighth to the fourteenth degree, both inclusive, as plainly appears from the *Smriti-chandriká* (in Sanskrit) as well as from other books. See the Succession of *Samánodakas* in this book and in the corresponding book in *Sanskrit* and *Urdu*.

§ *Smri. Chan.* Chap. XI, Sec. V, Cl. 13.

According to the doctrine prevalent in the Mahratta School,—

163. In default of brother's sons, succeed the gentile relations (*gotraja*) within the seventh degree, being connected by funeral oblations (*sapinda*).—*Vyav. Mayu.* Chap. IV, Sec. viii, § 18. *Vyavasthá.*

164. The first among these is the paternal grandmother.—*Ibid.* *Vyavasthá.*

According to this text of MANU: "The mother also being dead, the father's mother shall take the heritage [on failure of brothers and nephews.]" Even though she is (here) mentioned immediately next to the mother, still she is to be entered at the end, after the brother's sons, after the manner of the entry of (the *sráddha* for) incidental persons at the end, (as deceased acquaintances, &c.,) because the placing her in the middle (is in violation) of the rank fixed for each, as far as brother's sons.—*Ibid.*

165. In default of her, comes the sister.*—*Ibid.* Para. 19. *Vyavasthá.*

Under this text of MANU: "To the nearest *sapinda* (male or female), after him in the third degree, the inheritance next belongs:" and this of VRIHASPATI: "Where many claim the inheritance of a childless man, whether they be paternal or maternal relations, (*sakulyah,*) or more distant kinsmen (*bándhavah*), he who is the nearest of them shall take the estate." And (the next rank is) her's, both from her being begotten under the brother's family name, and there being no further reservation with respect to the gentile relationship (*gotrajatwa*): it does not particularly specify the same gentile kindred.—*Ibid.*, § 19. *Reason and Authority.*

166. On failure of her, the paternal grandfather, and half-brother are both to share and take it (the inheritance).—*Ibid.*, § 20. *Vyavasthá.*

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* Vide precedents, pp. 275, 467, 486—492.

Reason. Their propinquity being equal, since the (deceased person's) own father was begotten by the former of those two, and was himself the begetter, of the latter, as well as of the deceased. The propinquity being similar, and there being a want of any other notice, however slight, beyond the order of the text, or the like, therefore, in other cases, we must act even thus. For this reason,—*

Vyavasthá. **167. In default of these two, the paternal great-grandfather, the father's brother, and the sons of the half-brother shall take and share it (the inheritance).—*Ibid.*, § 20.**

Vyavasthá. **168. All the *sapindas and samánodakas* follow, in the order of propinquity.—*Ibid.*, § 21.**

They are (thus) enumerated by MANU:—"Now the relation of *sapindas* (or men connected by funeral cake,) ceases with the seventh (*a*) person (or in the sixth degree of ascent or descent,) and that of the *samánodakas* or those connected by an equal libation of water ends only when their births and family names are no longer known." *Ibid.*

(*a*) The *seventh* must be understood as of him passed away. *Ibid.*

The relation of *sapinda* is of two kinds: 1. Through body or consanguinity, and 2. connection by funeral cake (*pinda*).†

The relation of *sapinda* by consanguinity is as follows:—

Relation of *sapinda* by consanguinity. The relation of *sapinda* is by connection with (or by containing a portion of) the same body. Thus the son having sprung from the body of his father, has the relation of *sapinda* (through consanguinity) with his father; so also with the paternal grandfather and the rest, since there

* *Vyan. Mayú.* Chap. IV, Sect. viii, § 20.
† *Da. Mím.* Sec. VI, § 32.

exists consanguinity between him and them through the father. In like manner, having sprung from the body of the mother, he bears the relation (of *sapinda*) to her, also to the maternal grandfather and the rest, and the mother's brother, sister, and the rest, by reason of consanguinity through the mother; so also to the father's brothers and sisters and the rest (by reason of consanguinity through the father:) the wife commencing to be of the same body with the husband, (bears the *sapinda* relation to the husband): the brother and brother's wife likewise commencing reciprocally to be of the same body, are *sapindas* by reason of being from the same body. Thus, wherever the word '*sapinda*' is (used), there consanguinity must be known to exist directly or indirectly.—*Mitákshará Áchára Adhyáya, Sans.* pp. 5, 6. See *Parásara-mádhava.**

The *Sapinda* relation by connection of the funeral cake is described as follows :—

Relation of *sapinda* by connection of funeral cake.

According to the *Chandriká, Aparárka, Medhátithi, Mádhava* and other books, the *sapinda* relation arises from the act of presentation (by two or more persons) of the oblation-cake to the *manes* of one and the same individual. "The fourth person and the (two) rest share the remains of the oblations wiped off with *kusha* grass, the father and the (two) rest share the funeral cakes, the seventh person is the giver of oblations; the relation of *sapindas* or men connected by the funeral-cake extends (therefore) to the seventh person (or sixth degree in ascent or descent)." *Matsya-purána.* It should not be said that a paternal uncle and the rest (*i. e.*, brother's son) are not reciprocally *sapindas*, since the same ancestor who participates in the oblation offered by the uncle, participates also in that offered by the nephew. If any one of those ancestors who participate in the funeral oblation offered by one individual be also the participator of the funeral oblation offered by another, then all of them become *sapindas* to each other.†

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* *Vide* Precedents, p. 511.

† If the passage contained at page 37 of the Select Reports, Vol. III and quoted therefrom in the case of *Amrita Moyee Debee* vs. *Lukhee Narain Chuckerbutty* (See prec. p. 511) professes to be a translation of the very Sanskrit passage of which the above is one, it must be erroneous.

Their wives also are *sapindas* by reason of relationship arising from their right to associate with their husbands in the performance of the *shráddhas*, also by reason of its being declared in the *Smriti* that the wife becomes united with her husband in the presentation and participation of oblation-cakes, in *gotra*, and impurity.—*Nirnoya-sindhu*, Chapter III, Leaf 22.

Premising the son, son's son and son's grandson (in the male line) BOUDHÁYANA says:—

Relation of *sapinda* by connection of funeral cake.

"The paternal great-grandfather, grandfather, the father and the man himself, his brothers of the whole blood, his son by a woman (wife) of the same tribe, grandson and great-grandson: all these partaking of undivided oblations, are pronounced '*sapindas*.' Those who share divided oblations are called '*sakulyas*'. Male issue of the body being in *esse*, the property goes to them." The meaning of the (above) passage is this,—since (the fourth person or the proprietor) enjoys the oblation-cakes presented to the father and the two next ancestors, as being the participator in the offerings at obsequies; and since the son and other descendants to the number of three present oblations to the deceased; and he, who, while living, presents an oblation to an ancestor, partakes, when deceased, of the oblations presented to the same person; such being the case, the middle-most (of the seven) who, while living, offered food to the *manes* of ancestors, and, when dead, partook of the offerings made to them, became the object to which the oblations of his descendants were addressed in their life-time, and shares with them, when they are deceased, the food which must be offered by the daughter's son and other (surviving descendants beyond the third degree). Hence those ancestors to whom he presented oblations, and those (descendants) who presented oblations to him, partake of the undivided offering in the form of *pinda* (food at obsequies). Thus the persons who do partake of such offerings are *sapindas*, they being connected by the same oblation-cake. But one distant in the fifth degree, neither gives an oblation to the fifth in ascent, nor shares the offering presented to his *manes*. So the fifth in descent neither gives oblations to the middle person who is distant from him in the fifth degree, nor partakes of the offerings

SECTION VII.

On the Succession of Cognates (*Bandhus*).

Vyavasthá. **169. In default of gentiles, the cognates are heirs.**

Authority. On failure of gentiles, the cognates are heirs.—*Mit.* In. Chap. II, Sect. vi, § 1.

Cognates are of three kinds; related to the person himself, to his father, and to his mother: as is declared by the following text:—" The sons of his own father's sister, the sons of his own mother's sister, and the sons of his own maternal uncle, must be considered as his own cognate kindred. The sons of his father's paternal aunt, the sons of his father's maternal aunt, and the sons of his father's maternal uncle, must be deemed his father's cognate kindred. The sons of his mother's paternal aunt, the sons of his mother's maternal aunt, and the sons of his mother's maternal uncle, must be reckoned his mother's cognate kindred."—*Mit.* In. Chap. II, Sect. vi, § 1.

Authority. VÁCHASPATI MISRA:—In default of kinsmen allied by family, the cognate kindred (*bandhu*) shall inherit, as stated by YÁJNAVALKYA. Cognate kindred are of three sorts, namely, a person's own, his father's, and his mother's, who are thus specified.—" The sons of his own father's sister,*" &c.†

Authority. DEVÁNANDA BHATTA:—Cognate kindred are described (as follows) in a different *Smriti*, according to their order of proximity. " The son of his father's sister,‡ &c.||

Authority. If no distant kinsmen (*sodaka*) exist, then come in the cognate kindred (*bandhus*), who are thus specified in another *Smriti*:—" The sons of his own father's sister, the sons of his own mother's sister, and the sons of his own mother's brother, must be considered as his own congate

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* *Vi. Chi.* pp. 297, 298.
† The rest as above.
‡ *Smriti. Chan.* Chap. XI, Sect. v. Cl. 13, 14.
|| The rest as above.

kindred. The sons of his father's paternal aunt, the sons of his father's maternal aunt, and the sons of his father's maternal uncle, must be deemed his *father's* congate kindred. The sons of his mother's paternal aunt, the sons of his mother's maternal aunt, and the sons of his mother's maternal uncle, must be reckoned his mother's cognate kindred. Here the order (of succession) is even the order of the text.—*Vyav. Mayú.* Chap. IV, Sect. viii, § 22.

170. These inherit according to the order of their proximity. That is to say, first the deceased's own *bandhus*, in their default, his father's *bandhus*, and failing them, his mother's *bandhus*, take the inheritance. *Vyavasthá.*

These should inherit according to their order. BÁLA-RÚPA is of the same opinion.—*Vi. Chi.*, p. 198. **Authority.**

Here by reason of near affinity, the cognate kindred of the deceased himself, are his successors in the first instance; on failure of them, his father's cognate kindred; or, if there be none, his mother's cognate kindred.—*Mit.* In. Chap. II, Sect. vi, § 2. **Authority.**

"Cognate kindred are described according to the order of their propinquity."*—"Here the order (of succession) is even the order of the text."†—"These should succeed according to their order."‡ From these passages it appears that *bandhus* of each kind do not inherit all simultaneously, but one after the other as enumerated in the text. Hence among one's own *bandhus* his father's sister's son succeeds in the first instance, next his mother's sister's son, and then his maternal uncle's son. His father's *bandhus* too succeed in the same order, and so do his mother's *bandhus*.(1)

Annotations.

(1) The learned Translator of the *Smriti-chandriká* has, accordingly given, in his Summary, the order of succession of every one of

* *Smri. Chan.* (Sans) p. 77, see its English translation p.
† *Vyav. Mayú.* Chap. IV, Sect. vii, § 22.
‡ *Vi. Chi.* p. 198.

In default of *Samánodakas* or kinsmen allied by libation of water, the *bandhus* or cognate kindred succeed. The *bandhus* are of three kinds; one's own *bandhus*, his father's *bondhus*, and his mother's *bandhus*; as described in a *Smriti*.—"The sons of his own father's sister, the sons of his own mother's sister, and the sons of his own maternal uncle, must be considered as his own cognate kindred. The sons of his father's paternal aunt, the sons of his father's maternal aunt, and the sons of his father's maternal uncle, must be deemed his father's cognate kindred. The sons of his mother's paternal aunt, the sons of his mother's maternal aunt, and the sons of his mother's maternal uncle, must be reckoned his mother's cognate kindred."—*Vi. Mi.* (Sans.) p. 209.

MANU says—"Then on failure of *sapindas* and of their issue, the *sakulya* (*a*) shall be the heir, or spiritual preceptor, or the pupil, or *the fellow-student of the deceased.*" Chap. IX, verse 187.—*Vi. mi.* (Sans.) p. 209.

(*a*) Here by the term *sakulya* must be understood kinsmen of the same *gotra*, those allied by libation of water (*samánodakas*), and the three *bandhus* (*vis.*,) maternal uncle and the rest. The term '*bandhu*' in the text of YÁJNAVALKYA is also indicative of the maternal uncle; as otherwise the result would be that the maternal uncle and the rest would be omitted, and their sons will be heirs while *they* who are nearer will not be so: this, indeed, would be a great piece of injustice (1).—*Vi. Mi.* (Sans.) p. 209.

Thus according to the *Vír-mitrodaya*,—

Vyavasthá. **171.** One's own maternal uncle inherits as a *bandhu* before his son and nephew, and so do the

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Annotations.

the abovementioned *bandhus* just as above stated. This is as follows:—"23. The son of the father's sister. 24. The son of the mother's sister. 25. The son of the maternal uncle. 26. The son of the father's paternal aunt. 27. The son of the father's maternal aunt. 28. The son of the father's maternal uncle. 29. The son of the mother's paternal aunt. 30. The son of the mother's maternal aunt. 31. The son of the mother's maternal uncle.—*Smri. Chan.* p. 198.

father's maternal uncle and mother's maternal uncle before their sons and nephews, respectively.*

The author of the *Virmitrodoya* having enumerated as *bandhus* the three maternal uncles in their proper places, and the author of the *Vivâda-chintâmani* having recognised the heritable right of the maternal uncle and the rest in default of the remotest *sakulya*,† it appears that according to their opinion the foregoing text mentioning *bandhus* does not give an exhaustive list of them, but only shows that they are of three descriptions.

And it having been so written in the *Vira-mitrodoya* which is held to be an exposition of what may have been left doubtful by the *Mitâkshará* and declaratory of the law of the Benares school, the Honorable Judges of the High Courts in India and the Lords of the Judicial Committee of the Privy Council have determined that—

172. The text respecting *bandhus*, cited in the *Mitâksharâ*‡ does not give an exhaustive list of them but is simply illustrative of the proposition that there are three classes of *bandhus*, that, consequently, the maternal uncle and the rest, and also the *Vyavasthâ.*

Annotations.

171. In this series no provision appears to have been made for the maternal relations in the ascending line; but VÁCHASPATI MISRA, in the *Vivâda-chintâmani*, assigns to 'the maternal uncle and the rest (*mâtulâdi*),' a place in the order of succession next to the *samânodakas;* and MITRA MISRA, in the *Vira-mitrodoya*, expresses his opinion, that as the maternal uncle's son inherits, he himself should be held to have the same right by analogy.—Note by Sir W. Macnaughten.

* *Vide* Precedents, pp. 522—528.

† See *Vi. Chi.* p. 299, and *post*, p. 205.

‡ *Ante*, page 194.

father's daughter's son and the rest are entitled to inherit as *bandhus* in the order of propinquity.*

Vyavasthá. 173. Of the kinsmen *(jnátis)*, distant kinsmen *(sakulyas)*, and cognate kindred *(bandhus)*, in default of one that stands nearest (in the order expressly given), those who are somehow nearer are preferable.†

Because it has been declared by GOUTAMA:—"Let those take the inheritance who give the funeral cake (*pinda*), who are of the same *gotra*,‡ or who are sprung from the same RISHI.—*Vide Smri. Chan.* Chap. XI, Sect. v, Cl. 15.

SECTION VIII.

ON SUCCESSION OF THE SPIRITUAL PRECEPTOR, AND THE REST.

Vyavasthá. **174. In default of the cognate kindred, the spiritual preceptor [*A'chárya (a)*], inherits, on failure of him, the pupil [*Shishya (b)*].§**

Authority. If there be no cognate kindred (*bandhus*),|| the spiritual preceptor, on failure of him the pupil, inherits, by the text of ÁPASTAMBA: "If there be no male issue, the nearest kinsman inherits: or, in default of kindred, the preceptor; or, failing him, the disciple."—*Mit.* In. Chap. II, Sect. vii, § 1.

Vyavasthá. In default of cognate kindred, the preceptor; on failure of him, the pupil; by this text of ÁPASTAMBA: "If there be no male issue, the nearest kinsman inherits; or, in default

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* *Vide* Precedents, pp. 505—533.

† *Smri. Chan*, Sans. p. 77. See Krishna Swámi Iyer's translation, p. 197.

‡ From the same race or general family.

§ *Vide* Precedents pp. 539—541.

|| The original of this much is "*Bandhúnámabháve*" the translation of which is as above given. Mr. Colebrooke, however, has rendered it by "If there be no relations of the deceased."

of kindred, the preceptor; or, failing him, the disciple.—*Vyav. Mayû.* Chap. IV, Sect. viii, § 25.

If it be asked who inherits in default of *Bandhus*, YÁJNAVALKYA says—"A pupil, and a fellow-student." Add to these the words—"take the inheritance."—*Smri. Chan.* Chap. XI, Sect. vi, Cl. 1. Authority.

It is to be understood here that the preceptor himself was not specifically mentioned in the above text, as it was unnecessary, seeing that a preceptor was entitled to more regard than a pupil, that since mention has been made of the pupil himself in the line of heirs, the preceptor, on the analogy of the loaf and staff,* takes of course precedence before the pupil, and succeeds to the deceased's property in default of *bandhus.*—*Smri. Chan.* Chap. XI, Sect. vi, Clause 4.

(*a*) The spiritual preceptor is he who instructs his pupil after investing him with the holy thread, whence is he denominated *A'chárya.* See Coleb. Dig. Vol. III, pp. 533, 534.

(*b*) He is a pupil on whom the deceased caused the ceremony of *Upa-nayana* to be performed and to whom he taught the *Vedas.*—*Smri. Chan.* Chap. XI, Sect. vi, Cl. 2.

172. In dafault of the pupil, the fellow-student (*c*) becomes the heir. *Vyavasthá.*

If there be no pupil, the fellow-student(*c*) is the successor.—*Mit.* In. Chap. II, Sect. vii, § 2. Authority.

In default of the pupil, the fellow-student is the successor: *Vyav. Mayú.* Chap. IV, Sect. vii, § 25. Authority.

On failure of the pupil, the fellow-student takes the inheritance.—*Vi. Mi.* (Sans.) p. 209. Authority.

(*c*) He who received his investiture, or instruction in reading or in the knowledge of the sense of scripture, from the same preceptor, is a fellow-student.—*Mit.* Chap. II, Sect. vii, para. 2.

* The analogy of the loaf and staff] To gnaw the staff was difficult for a rat; but, if that was accomplished, the eating of the loaf, which was attached to it, was easy. So in other cases, according to the circumstances of them, if one of associated things be true, the other may be rightly inferred.—*Smri. Chan.* Chap. XI, Sect. vi, *note.*

(c) He is a fellow-student who acquires his learning (in the *Vedas*) from the same preceptor (as the deceased).—*Smri. Chan.* Chap. XI, Sect. vi, Cl. 3.

Vyavasthá. **173. In default of heirs as far as the fellow-student, some venerable *Bráhmana* learned in the *Vedas* (*Srotriya*) inherits the property of a *Bráhmana.***

Authority. If there be no fellow-student, some learned and venerable priest should take the property of a *Bráhmana*, under the text of GOUTAMA: "Venerable priests should share the wealth of a *Bráhmana*, who leaves no issue."—*Mit.* In. Chap. II, Sect. vii, § 3.

Authority. MANU:—On failure of all those, the lawful heirs are such *Bráhmanas* as have read the three *Vedas*, as are pure in body and mind, as have subdued their passions. Thus virtue is not lost.—*Ibid.* § 4.

Authority. If it be asked who succeeds in default of a fellow-student, MANU declares "On failure of all those, the lawful heirs are such *Bráhmanas* as have read the three *Vedas*, as are pure in body and mind, and as have subdued their passions. Thus virtue is not lost. The property of a *Bráhmana* shall never be taken by the king. This is a fixed law."—*Smri. Chan.* Chap. XI, Sect. vi, Cl. 5.

Authority. In default of the pupil, the fellow-student is the successor; in default of him, a *Srotriya*, from the text of GOUTAMA: "Venerable priests (*Srotriya*) should share the wealth of a *Bráhmana* who leaves no issue.—*Vyav. Mayú.* Chap. IV, Sect. viii, § 25.

Vyavasthá. **174. In default of a venerable *Bráhmana* learned in the *Vedas*, even any other *Bráhmana* is entitled to inherit the property of a *Bráhmana*, but not the king.**

Authority. In default of such an one, any other *Bráhmana*, by reason of this text of KÁTYÁYANA: "But in default of all those, the lawful heirs are such *Bráhmanas* as have read the three

Vedas, as are pure (in body and mind), as have subdued their passions. Thus virtue is not lost."—*Vyva. Mayú.* Chap. IV, Sect. viii, § 26.

In default of a *Bráhmana* possessing the qualifications above described, NÁRADA, referring to the king, says, "If there be no heir of a *Bráhmana's* wealth, on his demise, it must be given to a *Bráhmana*. Otherwise, the king is tainted with sin."—*Smri. Chan.* Chap. XI, Sect. vi, Cl. 6. Authority.

For want of such successors, any *Bràhmana* may be the heir. Never shall a king take the wealth of a priest; for the text of MANU forbids it: "The property of a *Bràhmana* shall never be taken by the king: this is a fixed law." It is also declared by NÁRADA: "If there be no heir of a *Bràhmana's* wealth, on his demise, it must be given to a *Bràhmana*. Otherwise the king is tainted with sin." *Mit.* In. Chap. II, Sect. vii, § 5. Authority.

In default of heirs as far as the fellow-student, some venerable *Bràhmana* learned in the *Vedas* should first take the property of a *Bràhmana*, and on failure of him, any *Bráhmana* should take it.—*Vi. Mi.* (Sans.) p. 209. Authority.

175. But the property of a *Kshatriya* or other person of an inferior tribe should be taken by the king on failure of heirs down to the fellow-student in theology. *Vyavasthá.*

But the king, and not the priest, may take the estate of a *Kshatriya* or other person of an inferior tribe, on failure of heirs down to the fellow-student.—*Mit.* In. Chap. II, Sect. vii, § 6. So— Authority.

MANU:—But the wealth of other classes, on failure of all (heirs), the king may take.—*Ibid.* Authority.

In default of a fellow-student, the king should take the property, excepting that of a *Bráhmana*, because the text of VASHISTHA (already cited) after stating the succession of heirs down to the fellow-student, declares—"On failure of him, the property, excepting that of a *Bráhmana*, goes to the king.—*Vi. Mi.* (Sans.) p. 209. Authority.

Authority. The property should be taken by the king excepting that of a *Bráhmana*, so says MANU:—"The wealth of a *Bráhmana* shall never be taken as an *escheat* by the king: this is the fixed law; but the wealth of the other classes, on failure of all heirs, the king may take. DEVALA (also says): "In every case, the king may take the property of a subject dying without an heir, except the estate of a *Bráhmana*; for the property of a *Bráhmana* dying without an heir (*a*) must be given to the learned priests".—*Vi. Chi.* page 298.

(*a*). *Without an heir.*—means without one who is entitled to inheritance.—*Ibid.*

Authority. On the demise of a person belonging to any other class than that of *Bráhmana*, MANU says with respect to his property—"But the wealth of the other classes, on failure of all (heirs), the king may take."—*Smri. Chan. Sans.* p. 78. Eng. p. 201.

Authority. VRIHASPATI:—The king takes the property of those *Kshatriyas, Voishyas*, and *Shúdras*, who leave no son, nor wife, nor brother, for he is, indeed, lord of all.—*Vi. Chi.* page 198. *Vyav. Mayú.* Chap. IV, Sect. viii, § 27.

At present, however, the property of a *Bráhmana also* is taken by the sovereign power in British India: The reason assigned for taking such property will be seen in the Privy Council Decision printed at page 534 of the Precedents.

After premising that in default of all (heirs) the estate goes to the king, NÁRADA says; "Excepting the wealth of a *Bráhmana*, but a king attentive to his duty shall allot a maintenance to the wives of the deceased(*b*). This is declared to be the rule of inheritance."—*Vide Smri. Chan.* Chap. XI, Sect. vi, Cl. 7.

(*b*.) To the wives of the deceased.] To the wives of the deceased owner of the property, not being a *Bráhmana*, and which wives are incompetent to inherit his property.—*Ibid.*

Here it is to be remarked that,—

Vyavasthá. **176.** Among the *Shúdras* there is neither spiritual preceptor, nor pupil, nor student in theo-

logy, they having no access to the *Vedas;* consequently, the king may take the property of a *Shúdra* who died without leaving heirs down to the *bandhus.*

The orders of succession according to the prevalent doctrines of the four different schools, as well as the differences existing between them, will be seen at one glance by looking at the table set out in the four pages next following.

The Order of Succession, according to the Law of the Benares and other three Schools, to the property of a man who died after being separated from his co-parceners and not subsequently reunited with them.

According to the Law prevalent in the Benares School (1).	According to the Law prevalent in the Mithilá School (2).	According to the Law prevalent in the Drávida Shool (3).	According to the Law prevalent in the Mahratta School (4).
1. Son.	1. Son.	1. Son.	1. Son.
2. Son's son.	2. Son's son.	2. Son's son.	2. Son's son.
3. Son's son's son.*	3. Son's son's son.	3. Son's son's son.	3. Son's son's son.
4. Widow.	4. Widow.	4. Widow.	4. Widow.
5. Unmarried daughter.	5. Unmarried daughter.	5. Unmarried daughter.	5. Unmarried daughter.
6. Married daughter unprovided for.	6. Married daughter.‡	6. Married daughter unprovided for.	6. Married daughter unprovided for.
7. Married daughter provided for or enriched.	7. Natural mother.	7. Married daughter provided for or enriched.	7. Married daughter provided for or enriched.
8. Daughter's son.	8. Father.	8. Daughter's son.	8. Daughter's son.
9. Natural mother.	9. Daughter's son.	9. Father.	9. Father.
10. Father.	10. Brother.	10. Natural mother.	10. Natural mother.
11. Whole-brother.	11. Brother's son.	11. Whole-brother.	11. Whole-brother.
12. Half-brother (by a different mother).	12. The nearest kinsmen.	12. Half-brother (by a different mother).	12. Whole-brother's son.§
13. Whole-brother's son.†	13. The remotest kinsmen according to their order.	13. Whole-brother's son.†	13. Paternal grandmother.
14. Half-brother's son.†	14. The nearest *sakulya*.	14. Half-brother's son.†	14. Sister.

(1) That is, according to the *Mitákshará* and *Vír-mitrodoya*. (2) That is, according to the *Viváda-chintámani*.

(3) That is, according to the *Smriti-chandriká*. (4) That is, according to the *Vyavahára-mayúkha*.

* See *ante*, pages 90—98. † See *ante*, page 178. ‡ See *ante*, page 153. § See *ante*, page 176.

15. Paternal grandmother.	15. The remotest *Sakulya*.	15. Paternal grandfather's son (paternal uncle).	15. { Paternal grandfather and Half-brother.
16. Paternal grandfather.	16. Maternal uncles and others.	16. Grandfather's grandson (paternal uncle's son).	16. { Great-grand father, Paternal uncle and Half-brother's son.
17. Grandfather's son (paternal uncle).	17. { *Bráhmana.*§ The king.‖	17. Great-grandfather's son (grandfather's brother).	17. *Sapindas* to the seventh degree in the order of propinquity.
18. Grandfather's grandson* (paternal uncle's son).		18. Great-Grandfather's grandson (grand-father's brother's son.)	18. *Samánodakas* as far as their births and family names are known, in the order of propinquity.
19. Paternal great-grandmother.		19. Great-great-grandfather's son (great-grandfather's brother.)	19. The deceased's own *bandhus* ‡
20. Paternal great-grandfather.	The above order or enumeration of heirs is the same as the summary of heirs given by VÁCHASPATI MISRA in his *Vivádachintámani*. See *Viváda-chintámani*. (Sans.) page 156; P. C. Tagore's translation, p. 299.	20. Great-great-grandfather's grandson (great-grandfather's brother's son).	20. His father's *bandhus*.‡
21. Great-grandfather's son (grandfather's brother).		21. Great-Great-Grandfather's father's son (great-great-grandfather's brother)	21. His mother's *bandhus* ‡
22. Great-grandfather's Grandson* (grand-father's brother's son).		22. Great-great-grandfather's father's grandson (great-great-grandfather's brother's son).	22. Spiritual preceptor.
23. Great-grandfather's mother.			23. Pupil (*Shishya*.)
24. Great-grandfather's father.			24. Fellow-student in theology.
			25. { *Bráhmana*§ The King.‖

* See *ante*, page 183; see also Precedents, pp. 475, 493—502.

† See *ante*, pages 184—188.

‡ See *ante*, pages 194—198.

§ To a *Bráhmana's* property, see *ante*, pp. 200, 201.

‖ To the property of a person who was not a *Bráhmana*. See *ante*, pages 201—203.

According to the law prevalent in the Benares School.	*According to the law prevalent in the Drávida School.*
25. Great-grandfather's father's son (*i. e.* Great-grand father's brother).	23. The son of the last *Sapinda.*
26. Great-grandfather's father's grandson,* (*i. e.*, Great-grandfather's brother's son).	24. His son.
27. Great-grandfather's grandmother.	25. First *Samánodaka's* son.
28. Great-grandfather's grandfather.	26. His son.
29. Great-grandfather's grandfather's son, (*i. e.*, great-great-grandfather's brother.)	27. Second *Samánodaka's* son.
30. Great-grandfather's grandfather's grandson* (*i. e.* great-great-grandfather's brother's son.)	28. His son.
31. Great-grandfather's great-grandmother.	29. Third *Samánodaka's* son.
32. Great-grandfather's great-grandfather.	30. His son.
33. Great-grandfather's great-grandfather's son, (*i. e.*, great-great-grandfather's uncle.)	31. Fourth *Samánodaka's* son.
34. Great-grandfather's great-grandfather's grandson* (*i. e.*, great-great-grandfather's uncle's son).	32. His son.
	33. Fifth *Samánodaka's* son.
	34. His son.

* See *ante*, page 183. See also Precedents, pp. 475, 498—502.

35. **First *Samánodaka*.**

36. First *Samánodaka's* son.

37. First *Samánodaka's* son's son.*

In this manner inherit six other *Samánodakas* in the ascending line, and their issue in the order of proximity.

38. The deceased's own *bandhus*.†

39. His father's *bandhus*.†

40. His mother's *bandhus*.†

41. Spiritual preceptor.

42. Pupil in theology.

43. Fellow-student in theology.

44. { *Bráhmana*.‡
The King.§

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35. Sixth *Samánodaka's* son.

36. His son.

37. Seventh *Samánodaka's* son.‖

38. His son.

39. The deceased's own *bandhus*. †

40. The deceased's father's *bandhus*.†

41. The deceased's mother's *bandhus*.†

42. The Spiritual preceptor.

43. Pupil in theology.

44. Fellow-student in theology.

45. { *Bráhmana*.‡
The King.§

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* See *ante*, page 183.

† See *ante*, pages 194—198.

‡ To a *Bráhmana's* property, see *ante*, pp. 200, 201.

§ To the property other than that of a *Bráhmana*, See *ante*, pp. 201—203.

‖ See *ante*, page 188.

The foregoing is the order of succession to the property which was held in severalty by a man separated from his co-heirs and not subsequently re-united with them.

Vyavasthá. **177.** The same is also the order of succession to the sole property of a man or to that which was separately acquired by him.*

The following are the orders of succession given by the European compilers or writers of Digests of Hindú law.

Of these, the order of succession set out in Sir W. Macnaghten's work on Hindú law is as follows:—

Macnaghten's order of succession.

"According to the law as current in Benares, in default of the son, and son's son, and grandson, the widow (supposing the husband's estate to have been distinct and separate) succeeds to the property under the limited tenure above specified. But if her husband's estate was joint, and held in co-parcenary, she is only entitled to maintenance."

"In default of the widow, the maiden daughter inherits, in her default, the married indigent daughter, in her default, the married wealthy daughter. Then the daughter's son. But the *Viváda-chandra, Viváda-ratnákara,* and *Viváda-chintámani,* authorities which are current in Mithila, do not enumerate the daugther's son among the series of heirs.† The mother ranks next in the order of succession, and after her the father. In default of him brothers of the whole-blood succeed, and in their default, those of the half-blood."‡

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* See *ante,* pp. 30, 31, 115, and Precedents, pp. 31, 244—251, 443.

† This is not quite correct, inasmuch as the *Viváda-chintámani,* having recognised the heritable right of the daughter's son has placed him after the father. See *ante* p. 162, and P. C. Tagore's translation of the *Viváda-chintámani,* p. 299.

‡ According to the commentary of BÁLAM-BHATTA the daughter's daughter inherits after the daughter's son; but this is not the received opinion. BALÁM-BHATTA is (also) of opinion, that brothers and sisters should inherit together; but this doctrine (too) is not received.—Note by Sir W. Macnaughten.

"In their default, their sons inherit successively.* Then the paternal grandmother;† next the paternal grandfather; the paternal uncle of the whole-blood, of the half-blood, their sons successively; the paternal great-grandmother;‡ the paternal great-grandfather, his son and grandson, successively; the paternal great-grandfather's mother;‡ his father, his brother, his brother's son. In default of all these, the *sapindas* in the same order as far as the seventh in degree, which includes only one grade§ higher in the order of ascent than the heirs above enumerated. In default of *sapindas*, the *samánodakas* succeed; and these include the above enumerated heirs in the same order as far as the fourteenth degree.‖ In default of the *samánodakas*, the *Bandhus* or cognates succeed. These kindred are of three descriptions, personal, paternal, and maternal. The personal kindred are, the sons of his own father's sister, the sons of his own mother's sister, and the sons of his own maternal uncle. The paternal kindred are, the sons of his father's paternal aunt, the sons of his father's maternal aunt, and the sons of his father's maternal uncle. His maternal kindred are, the sons of his mother's paternal aunt, the sons of his mother's maternal aunt, and the sons of his mother's maternal uncle.¶ In default of them, the *Áchárjya* or spiritual preceptor, the pupil, the fellow-student

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* According to Balám-bhatta, brothers' daughters, and brothers' sons inherit together; but neither is this opinion followed.—*Ibid.*

† Sríkara Áchárya maintains that the brother's grandsons have a title to the succession in default of the brother's sons; and this opinion is also held by the author of the *Viváda-chandriká*, but by no other authority (see, however, *ante*, p. 178); and there is the same difference of opinion, as to the relative priority of the grandmother, as has been noticed in the case of the father and mother.—*Ibid.*

‡ The same difference of opinion exists in this case also.—*Ibid.*

§ Not one, but two grades higher, because there are six degrees of *sapindas* besides the giver of the *pinda*, who being added to them completes the seventh degree. See *ante*, pp. 184, 191—193.

‖ The term *Gotraja* (or gentiles) has been defined to signify *sapindas* and *Samánodakas* by Bálam-bhatta and in the *Subodhini*, &c.

¶ See *Mitákshará* page 352. In this series, no provision appears to have been made for the maternal relations in the ascending line; but Váchaspati Misra in the *Viváda-chintámani*, assigns to 'the maternal uncle and the rest, (*Mátooládi*,)' a place in the order of succession next to the *Samánodakas*; and Mitra Misra, in the *Vira-mitrodaya*, expresses his opinion, that as the maternal uncle's son inherits, he himself should be held to have the same right by analogy.—1 Mac. H. L. p. 34, note.

in theology, learned *Bráhmins*;* and lastly, always excepting the property of *Bráhmins*, the estate escheats to the ruling power."—Macn. H. L. Vol. I, pp. 32—34.

After the above, he says:—"The order of succession agreeably to the law current in the South of India, *does not appear* to differ from that of Benares."†

Lastly, the learned compiler writes as follows:—

"In the *Vyavahára-mayúkha*, an authority of great eminence in the West of India, considerable deviation from the above order appears; and the heirs, after the mother, are thus enumerated. 'The brother of the whole-blood, his son, the paternal grandmother, the sister,‡ the paternal grandfather, and the brother of the half-blood, who inherit together.§ In default of these, the *sapindas* and *samánodakas* and *Bandhus* inherit successively, according to their degree of proximity."—Macn. H. L. Vol. I, p. 35.

Mr. Elberling, although treating of the Hindú law as current in the Mithilá, Bengal and Benares Schools, has given the order of succession chiefly according to the *Dáya-krama-sangraha* of SRÍKRISHNA TARKÁLANKÁRA, a Bengal authority.

Sir T. Strange has, in his work on Hindú law, stated the *Ordo successionis* in so confused a manner that it is

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* After learned Brahmins, common Brahmins should inherit. Moreover, *Brahmins* inherit only the property of Brahmins, and not of persons of any other class whose property goes, by escheat, to the ruling power.—See *ante*, pages 200—203.

† This is not correct, since the order of succession of the *Drávida* school differs vastly and materially from that of the Benares school, as will be seen by collating them in the table given at pages 204—207.

‡ The Bombay Reports Vol. ii page 471 exhibit a case demonstrative of the sister's right according to this doctrine, and in a suit between two cousins for the property of their maternal uncle, it was held that neither had any right during the lifetime of their uncle's sister. There is another similar case in Vol. i, page 71. But this admission of the sisters seems peculiar to the doctrine followed in that side of India. See Colebrooke cited in Stra. H. L Vol. ii. (1st Ed.) p. 252.—Note by Sir W. Macnaughten.

§ After this there is another deviation which has been omitted, though it ought to have been noticed, namely, "in default of the grandfather and half-brother, the paternal great-grandfather, paternal uncle, and half-brother's son inherit together." Then come in the *sapindas*, *samánodakas* and *Bandhus*. *Vide Vyav. Mayú.* Chap. IV, Sec. viii, § 20, and *ante*, pp. 189, 190.

impossible to find out therefrom the full and correct order of succession according to any school of Hindú Law. All that can be gathered therefrom on a careful perusal of the pages of his work devoted to the above subject, is as follows:—

According to the Hindú law as current in the Benares or any other school, except that of Bengal,—the son, son's son, and his son inherit successively, then comes the widow, on failure of her, daughters inherit, the single (though there should be one of that description,) taking the whole of the inheritance first, to the exclusion of the rest during her life. The single having enjoyed it, it next vests in the married ones.—*Vide* Stra. H. L. Vol. I, pp. 124, 128 and 138.

In southern India, widowed daughters if unendowed, inherit before endowed married daughters.* In default of daughters their sons inherit. On failure of these the parents inherit.† In default of parents, the brothers come in, the whole-brother taking in the first instance, then the half-brother. The line of brothers being exhausted, their sons succeed, the whole being preferred to the half-blood. The sons of nephews, or grand-nephews, next take, but here succession in the male line from the father direct stops, the great-grandson being too distant in degree to present oblations.‡ And failing heirs of the father down to the great-grandson, the inheritance devolves on his daughter's son.§ Failing issue of the father, inheritance continues to ascend upwards to the grandfather, and great-grandfather. The grandmother and great-grandmother, the latter being preferred in time by those who contend for the precedence, in succession to the mother before the father; descending also downwards to their respective issue, including daughter's sons, but not daughters.||—*Vide Ibidem* pp. 139—148.

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* This is not quite correct. See *Smri. Chan.* Chap. XI, Sect. ii, Cl. 20—28.

† But it is not clearly stated which of them succeeds first, according to the Benares and any other school (Bengal excepted).

‡ See, however, *ante*, page 178.

§ This, it must be said, is according to the Bengal law, since according to the law of any other country a father's daughter's son does not inherit before the gentiles (*gotraja*).

|| This also is wrong for the above reason.

The learned compiler does not, after this, mention the succession of any of the further heirs,* but states, as follows, his grounds for not doing so. "But, in proportion as the claim becomes remote, it varies in particulars with different schools and authors; the details of which, being beyond the scope of a work so general as the present, recourse must be had to the summary of SRÍKRISHNA, and especially to the two translated treatises on the subject, with notes and remarks of their learned translator, as well as to the "Digest," especially on the law of succession.†"—*Ibid.*, page 48.

Immediately after the above, he writes :—"In default of natural kin, the series of heirs, in all the classes, that of the Bráhmin excepted, terminates with the preceptor of the deceased, his pupil, his priest hired to perform sacrifices, or his fellow-student, each in his order; and finally, failing all these, the lawful heirs of the *Kshatriya, Voishya* and *Shúdra*, are learned and virtuous Bráhmins,—a description, however special, yet too comprehensive to be consistent with the right of escheat for want of heirs, in the king, and, therefore, has been narrowed, in construction to such as reside in the same town or village.—Failing all preceding claimants, the property of any of the inferior classes vests, by escheat, in the king: who, as with us, may be said to be, in this respect, *ultimus hœres.* But the estate of a *Bráhmin* descends eventually, and ultimately, to *Bráhmins,* or learned priests. That it cannot be taken as an escheat by the king. This, says Manu, is a fixed law?"—*Ibid* pp. 148, 149.

The above is not only incomplete but also incorrect, as will be observed by collating it with the *Mitákashará* and the other works of paramount authority, and also with the table given in pp. 204—207 of the present work which is in exact accordance with the above authorities.

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* But even so far as he has written is not the general order of succession of all the schools, not even the correct order of succession of the Bengal or Benares school, not to speak of those of the *Mithila, Drávida,* and *Mahratta* schools, which differ much from the above.

† Instead of expressing such difficulty and thereby frightening his reader, if the learned compiler had taken a little trouble to pick out the successive heirs from the translation of the *Mitákshará,* he could mention them all in less than a page, and could have given also the whole order of succession for the Bengal school from the other translated treatise, the *Dáya-bhága.*

The order of succession set out by Mr. Strange in his Manual of Hindû law, and which professes to be according to the *Mitáksharâ,* is also very incomplete if not so defective as that given by his father, Sir T. Strange. He says :—

"Property vesting in a person individually, descends first to his nearer *sapindas,* in the following order (according to the *Mitáksharâ.*) Sons, sons' sons, sons' grandsons.* Wife. Daughters. Daughters' sons. Mother. Father. Brothers. Brothers' sons. Paternal grandmother. Paternal grandfather. Paternal grandfather's sons (*i. e.*, the uncles). Paternal grandfather's sons' sons (*i. e.* the cousins).† Paternal great-grandfather, his sons, and sons' sons. The other ascending *sapindas*‡ and their sons and sons' sons in the like order. After this, the remoter *sapindas*§ come in their order; and then the *samânodakas* in their order; and lastly, the *bandhus*‖ in theirs." Sect. 315.

It will be known by collating the above with the order of succession according to the Benares School as set out in the *Mitáksharâ,* that Mr. Strange has omitted not only the heirs left to implication but also several of those expressly mentioned in that Book. See *Mit.* In. Chap. II, Sect. iv—viii, and the table given at pp. 204—207 of the present work.

The *Ordo successionis* given in Messieurs West and Buhler's Collection of *Vyavasthás* or law opinions (Vol. I, pp. 144 and 176) is also defective.

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* In the male line.

† After this the paternal great-grandmother, who has been expressly mentioned in the *Mitáksharâ* and other books, ought to have been placed before the paternal great-grandfather, but has been omitted. See *ante*, p. 182 and *Mit.* In. Chap. II, Sect. v, § 5.

‡ Does not say up to what degree.

§ The remoter *sapindas* commence *immediately* after the great-grandfather that is from the fourth ancestor, and end in the sixth inclusive; so there could be no ascending *sapindas* between the great-grandfather and the remoter *sapindas.* See *ante*, pp. 184, 190—193.

‖ The *Bandhus* do not take last of all, but after them comes in the spiritual preceptor, next the pupil, then the fellow-student in theology, and *lastly* learned Brahmins and the ruling power. See *ante* pp. 194—201, and *Mit.* Chap. II, Sect. vii, §. 1—6.

So of the several orders of succession, *that* which is set out by Sir William Macnaughten according to the *Benares* school is the only one which is the fullest of the lot, and which, subject to the remarks made in the foot-notes (pp. 208—210) can be taken to be complete in its kind.

SECTION IX.

ON SUCCESSION TO UNDIVIDED PROPERTY.

Vyavasthá. **178. The undivided property of a deceased man is inherited by those of his co-heirs with whom he was joint in estate or reunited after partition, and not by his widow, and the rest *(a)*.***

Reason. Because in the case of union or reunion (that is, joint tenancy) subsisting, the same property which belongs to one parcener belongs to another likewise; so when the right of one ceases by his demise, degradation or the like, the property belongs exclusively to the survivor, since he is not divested of his ownership. In other words, as the deceased had a right *united* with that of his surviving co-parcener in the *whole* of the property, and not a *several* right in any part of it, it ceased to exist at the close of his own existence; and as without partition no several or individual right could accrue† but every part of it that belonged to the deceased belonged also to his surviving parcener, so he left no right in the undivided property to devolve on, or vest in, his widow and the rest, who are neither the self-same with the deceased (as his son is), nor are his undivided co-parceners by birth (as his brothers and the rest are).

(a) From the expression 'not by his widow and the rest, it is implied that,—

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* See *ante*, pp. 27—31 and Precedents, pp. 18—22, 35, 36, 41—43, 149, 473—475, 431—485.

† Partition *(Vi-bhága)* is the adjustment of diverse rights regarding the whole by distributing them on particular portions of the aggregate.—*Mit.* In. Chap. I, Sect. i, § 4.

Partition confers a special or exclusive ownership on the sons and the rest over the paternal estate and so forth.—*Smri. Chan.* Chap. I, Cl. 27.

179. **The joint property of the man who died unseparated from, or reunited with, his undivided parceners devolves on his son and son's son notwithstanding the existence of his unseparated or reunited father, brother or any other co-parcener.*** *Vyavasthá.*

Because the heritable right of the son and son's son in the property of their father and grandfather having accrued by birth and being unobstructed, they by birth alone become undivided co-heirs of those ancestors. In other words, the son and grandson being consubstantial with the father and grandfather, the two latter, in the eye of the law, are in existence in the persons of their son and son's son who, in the undivided property, represent them in such a manner as if death did not take place.* Reason.

Veda:—His-self is truly born a son. See *Da. Mím.* Chap. IV, § 13. Authority.

Mahá-bhárata :—"He (the son) is (as it were) that very person, by whom produced.—See *Ibid.* Authority.

MANU :—The husband, after conception by his wife, becomes himself an embryo, and is born a second time here below, for which reason the wife is called '*jáyá,*' since by her he is born (*jáyate*) again.—Chap. IX, *v.* 5. Authority.

SANKHA and LIKHITA :—Let a priest take the hand of a woman equal in class; the bodies of his ancestors are born again of her. Let him figuratively address his own soul in the person of his son :—"Sprung from (my) several limbs, especially from the breast, thou, my soul, art called '*son*': mayest thou live for a hundred years! For the benefits conferred on parents, thou, my soul, art called 'son'; because thou deliverest (*tráyase*) from the hell called '*put,*' therefore, thou art named '*put-tra* (hell-deliverer).' See Coleb. Dig. Vol. III, (Lon. Ed.), p. 157. Authority.

From its being laid down that a widow becomes entitled to succeed where the husband dies *divided*, it is understood Authority.

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* See *ante*, pages 12, 18, 18, 19, 29, 30, 31, 46, and precedents, pages 18—22, 42, 49.

that where the husband dies *undivided*, his father, brother, or the like, who lived in union with him, takes the property of the *issueless* man."—*Smri. Chan.* Chap. XI, Sect. i, Clause 25.

Authority. NÁRADA too, after premising "Whatever is the share of re-united parceners goes to themselves," says, "Among brothers, if any one die without issue or enter a religious order, let the rest of the brothers divide his wealth, except the wife's separate property.—*Ibid.* § 52.

Authority. Thus it having been established that to the property of a man who died unseparated from, or re-united with, his co-parceners, his widow and the rest have no heritable right, but his son and son's son have,—they having represented him in the undivided property, it may be asked whether or not his (the late proprietor's) great-grandson (in the male line) has heritable right to such property? The answer would be,—

Vyavasthá. **180.** The great-grandson in case of his father and grandfather having predeceased is certainly entitled to inherit from his great-grandfather, though he was re-united with, or unseparated from, his co-parceners.

Reason. Because the term 'son (*put-tra*)' signifies also a grandson and great-grandson (in the male line); and because the great-grandson represents his father and grandfather by being consubstantial with them, and has, by birth, an unobstructed right in what they died possessed of, vested with, or entitled to.—See *ante*, pp. 12, 13, 18, 19, 92—97.

The following, therefore, is the *Vyavasthá* in extenso :—

Vyavasthá. **181.** The estate of a man who died while unseparated from, or re-united with, his co-parceners, is inherited by his son, fatherless grandson, and the great-grandson whose father and grandfather are dead; on failure of them, by those co-parceners or co-heirs with whom the deceased was joint in estate, but not by his widow, daughter, daughter's

son, mother, grandmother and any other female—as they having no right by birth, could not represent the deceased in the undivided property, nor are they his co-heirs or co-parceners by birth.*

CHAPTER III.

ON SUCCESSION TO THE PROPERTY OF THOSE WHO HAVING QUITTED THE HOUSE-HOLD ORDER ENTERED INTO ANOTHER.†

SECTION I.

On Succession to the Property of a Hermit, Ascetic, and Student in Theology.

182. The heir to the property of a professed or perpetual student in theology‡ is his preceptor,§ of an ascetic *(yati)* is his virtuous pupil, and of a hermit is his spiritual brother. *Vyavasthá.*

183. But the heirs to the property of a temporary student are, according to the different doctrines, his mother and the rest, or his father and the rest. *Vyavasthá.*

Because he resides only for a time in his preceptor's house for the purpose of instruction, and then returning home he resumes the house-hold order. Reason.

YA'JNAVALKYA:—The heirs of a hermit, of an ascetic, and of a student in theology [brahmachárí (*a*)] are, in their order (*d*), the preceptor, the virtuous pupil (*b*), and the spiritual brother and associate in holiness (*c*).‖ Authority.

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* See Annotation in p. 146 and Precedents, pp. 539—541.

† See *ante*, page 23.

‡ Students in theolgy (Brahmachárís) are of two descriptions: professed or perpetual (*naishthika*), and temporary (*upa-kurvána*).

§ Since abandoning his father and the rest, he makes a vow of residing for life in his preceptor's family.

‖ *Mit.* In. Chap. II, Sect. viii, § 1;—*Vyav. Mayú.* Chap. IV, Sect. viii, § 28;—*Smri Chan.* Chap. XI, Sect. vii, § 1;—*Vi. Chi.* p. 299;—*Vi Mi* (Sans.) page 210.

The heirs to the property of a hermit, of an ascetic, and of a student in theology, are, in order, (that is) *in the inverse order*, the preceptor, a virtuous pupil, and a spiritual brother belonging to the same hermitage.—*Mit.* In. Chap. II, Sect. viii, § 2.

(*a*) Here student must be a professed or a perpetual one (*noishthika*), for the mother and the rest or the natural heirs take the property of a temporary student, and the preceptor is declared to be the heir of a professed student as an exception (to the claim of the mother and the rest).—*Mit.* In. Chap. II, Sect. viii. § 3.

(*a*) The term student (*brahmachárí*) being used together with the word ascetic, means a perpetual student (*noishthika*); consequently, the father and the rest will, in the order mentioned, take the property of a temporary student (*upa-kurvána*), on failure of his issue down to the daughter's son.—*Vi. Mi.* (Sans.) p. 210.

(*a*) The term student (*brahmachárí*), from being mentioned in the above passage, together with an ascetic, means a *noishthika* or perpetual student.—*Smri. Chan.* Chap. XI, Sect. vii, Cl. 2.

(*a*) *The student,* a perpetual one, for the father and the rest even are (the natural heirs) of a temporary student.—*Vyav. Mayú.* Chap. IV, Sect. viii, § 28.

(*b*) A virtuous pupil takes the property of a *yati* or ascetic. A virtuous pupil (*sat-shishya*) again, is one who is assiduous in the study of theology, in retaining the holy science, and in practising its ordinances. For, a person, whose conduct is bad, is unworthy of the inheritance, were he even the preceptor or (standing in) any other (venerable relation).—*Mit.* In. Chap. II, Sect. viii, § 4.

(*b*) The right of a pupil is dependent on his good conduct, that is, on his being assiduous in the study of theology, in retaning the holy science, and in practising its ordinances; for it is seen in other authorities that even the son and the rest whose conduct is bad have no right to inherit.—*Vi. Mi.* (Sans.) page 210.

(*c*) A spiritual brother and associate in holiness takes the goods of a hermit (*Vána-prastha.*) A spiritual brother

is one who is engaged as a brotherly companion (having consented to become so.)* An associate in holiness is one appertaining to the same hermitage. Being a spiritual companion, and belonging to the same hermitage, he is a spiritual brother associate in holiness.—*Mit.* In. Chap. II, Sect. viii, para. 5.

(c) 'A spiritual brother,'—one who has agreed to bear the appellation of 'brother.' The word '*tírtha*' signifying the abode of retired saints or sages: 'a spiritual brother' (here) means a spiritual companion belonging to the same hermitage.—*Vi. Mi.* (Sans.) page 210.

(c) '*The spiritual brother,*'—one who has agreed to bear the appellation of 'brother.' '*An associate in holiness,*' one appertaining to the same hermitage. 'Being a spiritual companion and belonging to the same hermitage'—is a compound of nouns designating the same person (*karmadháraya samása*).—*Vyva. Mayú.* Chap. IV, Sect. viii, § 28.

(c) '*A spiritual brother*' is one who has the same preceptor. '*An associate in holiness*' is one who has studied the same *Shástra.*—*Smri. Chan.* Chap. XI, Sect. vii, Cl. 2.

(d) '*In order,*' that is in the inverse order. Therefore, the preceptor takes the goods of the professed or perpetual student, who passes away his life in the abode of his spiritual preceptor. The property of an ascetic is taken by his pupil. The property of a hermit is taken by one of his fellows.—*Vi. Chi.*, page 299.

(d) Here "order" means the 'inverse order'. Thus the property of a perpetual student devolves on his spiritual preceptor, of an ascetic on his virtuous pupil, and of a hermit on his spiritual brother of the same hermitage. *Vi. Mi.* (Sans.) p. 210.

(d) '*In order*' means, on failure of the first among these, the next in order.†—*Ibid.*

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* *Subodhini.*

† The *Mitákshará*, *Víra-mitrodoya*, *Viváda-chintámani* and many other authorities construe the term "*in order*" as meaning in the inverse order (see above), and that is the received doctrine.

It being said that "the right of a pupil is dependent on his good conduct,"* and that "the virtuous pupil is one who is assiduous in the study of theology, in retaining the holy science, and in practising its ordinances. For a person whose conduct is bad, is unworthy of the inheritance, were he even the preceptor or (standing in) any other venerable relation),"†—

Vyavasthá. **184. The pupil as well as the preceptor whose conduct is bad is unworthy of this inheritance.**

Vyavasthá. **185. On failure of these (namely the preceptor and the rest), any one associated in holiness takes the goods, even though sons and other natural heirs exist.—*Mit.* In. chap. II, Sect. viii, § 6.**

Although according to the text:—"They who have entered into another order, are debarred from shares‡"—there is no probability of ascetics and hermits getting the ancestral wealth, yet a hermit is allowed to collect food for his support for a year, and an ascetic has his property, such as a *coupína*§ and the like.—*Vi. chi.* (Sans.) p. 156. See P. C. Tagore's translation, p. 300.

Are not those, who have entered into a religious profession, unconcerned with hereditable property? since VASHISHTHA declares, "They, who have entered into another order, are debarred from shares." How then can there be a partition of their property? Nor has a professed student a right to his own acquired wealth: for the acceptance of presents, and other means of acquisition, [as officiating at sacrifices and so forth,] are forbidden to him. And since GAUTAMA ordains, that "A mendicant shall have no hoard; the mendicant also can have no effects by himself acquired. The answer is, a hermit may have property: for the text [of YÁJNYAVALKYA] expresses:—"The hermit may make a

* *Vi. Mi.* (Sans). p. 210. See *ante*, p. 218.

† *Mit.* In. Chap. II, Sect. viii, § 4. See *ante*, p. 218.

‡ Vashishtha, 17, 43.

§ A small piece of cloth worn over the privy parts.

hoard of things sufficient for a day, a month, six months, or a year; and, in the month of *Áswina*, he should abandon [the residue of] what has been collected." The ascetic too, has clothes, books and other requisite articles: For a passage [of the *Veda*] directs, that "he should wear clothes to cover his privy parts;" and a text [of law] prescribes, that "he should take the requisites for his austerities, and his sandals." The professed student likewise has clothes to cover his body; and he possesses also other effects.—*Mit.* In. Chap. II, Sect. viii, § 7—8.

SECTION II.

On Succession to Mahants and the Like.

It has already been said that the property of a *yati* (ascetic) is inherited by his virtuous pupil (*ante*, p. 217). In imitation of the same,—

186. The property held by *Boiragís*, *Mahants* and other like devotees, who are corrupt *yatis*, is succeeded to by their virtuous pupils or principal *chelás*, subject, however, to the usage or custom of the particular *maths* or monasteries of each sect.* *Vyavasthá.*

Annotations.

186. Of such successions an instance will be found in the appendix,† and several in the Bengal Reports, referable to the religious order of *Sanyásís*, or *Gossáins*, who being restricted from marrying, and consequently precluded from leaving legitimate issue, are, on their death, succeeded in their rights and possessions by their *chellás*, or adopted pupils. It may be added here, that lands endowed for religious purposes are not inheritable at all as private property, though the management of them, for their appropriate object passes by inheritance, subject to usage; as in the case of many of the religious establishments in Bengal, where the superintendence is, by custom, on the death of the incumbent, elective by the neighbouring *Mahants*, or principals of other similar ones.—Stra. H. L. Vol. II, pp. 150, 151.

* *Vide* Precedents, pp. 542—557.
† That is, in Stra, H. L. Vol. II, p. 248.

Generally, the usage or custom of *Mahants* is, that the *Mahant* or principal of every *math* or monastery selects his principal and most worthy pupil to succeed to him at his decease; that after his death, the *Mahants* of other similar institutes in the vicinage convene an assembly of the order and perform his *Bhandárá* or funeral obsequies, at which they generally confirm the nomination made by the deceased, and install the pupil, he selected, as his authorized successor; that if the *Mahant* for the time being does not find any of his pupils worthy of the office, he selects some one from any other *muth* of the order and appoints him his successor, and his appointment is confirmed by the *Mahants* convened at the *Bhandárá*; but where a *Mahant* died without appointing a successor, there his successor is selected generally from amongst his pupils by the *Mahants* convened at his *Bhandárá*, and invested with the Mahantship of the *math*; that if the person nominated by the late *Mahant* be found by them to be unworthy of the office, then they (the convened *Mahants*) elect a fit person and appoint him successor of the late *Mahant*. In short, the installation of the successor by an assembly of *Mahants* at the obsequies of the deceased *Mahant* is in all cases indispensable and conclusive; and, consequently, the appointment of a successor by the late *Mahant* is not final so long as it is not confirmed by the *Mahants* convened at the *Bhandárá*.*

In some countries, especially in *Urissah*, there are three kinds of *Maths* or Monasteries, namely, "*Mouroosee, Punchâetee,* and *Hákimee.*" In the first, the office of *Mahant* is hereditary, and devolves upon the chief disciple of the existing *Mahant*, who moreover usually nominates him as his successor; in the second, the office is elective, the presiding *Mahant* being selected by an assembly of *Mahants*; and in the third, the appointment of the presiding *Mahant* is vested in the ruling power, or in the party who endowed the temple.—*Vide* Precedents, p. 549.

Vyavasthá. **184.** But the property acquired by the (so called) ascetics who have not *boná fide* retired from all wordly affairs, devolves on their former heirs (*viz.*, sons and the rest).†

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* *Vide* Precedents, pp. 542—557.

† *Vide* Precedents, pp. 557, 558.

CHAPTER IV.

ON CUSTOM OR USAGE, &c.

SECTION I.

ON SUCCESSION BY USAGE OR CUSTOM.

Although succession to inheritance is regulated by the principles or rules contained in the preceding chapters, yet,—

185. If a custom or usage has obtained in a district, village, nation, tribe, class, or family, and has been *invariably* observed from time immemorial or for many generations,* it supersedes the general maxims or rules of the law.† *Vyavasthá.*

So, according as the custom may be, the sons may deduct in the first place unequal portions (as the eldest one twentieth, the middlemost one fortieth, and so on), and then divide the residue equally,‡ or they may divide the estate Illustration.

Annotations.

185. Usage being a branch of the Hindú law, which, wherever it obtains, supersedes the general maxims of the law.—Stra. H. L. Vol. I. (2nd Ed.) 251.

* Although in this country we cannot go back to that period, which constitutes legal memory in England, *viz.*, the reign of Richard I, yet still there must be some limitation, without which a custom ought not to be held good. In regard to Calcutta, I should say that the Act of Parliament in 1773, which established this Supreme Court, is the period to which we must go back to found the existence of a valid custom, and that after that date, there can be no subsequent custom, nor any change made in the general laws of the Hindoos, unless it be by some Regulations by the Governor General in Council, which has been duly registered in this Court. In regard to the Mofussil, we ought to go back to 1793, prior to that, there was no registry of the Regulations, and the relics of them are extremely loose and uncertain.—Extract from a judgment of Sir Charles Grey, C. J. See Clarke's Reports, pp. 113,114.

† *Vide Precedents*, pp. 560 *et seque.*

‡ See Partition and Precedents, pp. 573—575.

according to the number of their mothers, without reference to the number of the sons borne by each (a distribution technically termed "*patnitah Vi-bhága*);* or the eldest, or another brother, qualified, may singly take the landed estate,† according as there may be the immemorial *kuláchár* or family-custom.

Authority. KÁTYÁYANA:—BHRIGU (says): "whatever be the usage of a country, tribe, or nation, body of people, or village, let that be followed, and let partition of heritage be made in conformity thereto."—*Vide* Coleb. Dig. Vol. III (Lond. Ed.) p. 376.

Authority. MANU:—Immemorial custom is transcendent law, approved in the sacred scripture and in the codes of divine legislators: let every man, therefore, of the three principal classes, who has a due reverence for the (*supreme*) spirit (*which dwells in him,*) diligently and constantly observe immemorial custom.—Chap. I, *v.* 138.

Authority. SAMVARTA:—Whatever custom has, in a country, come down from generation to generation, the same is transcendent law, provided it be not repugnant to the (ordinances of the) *Vedas.—Samvarta-Sanhitá.*

Authority. MANU:—The king who knows the revealed law, must inquire into the *dharmas (a)* of classes, the *dharmas* of districts, the *dharmas* of traders and the like, and the *dharmas* of families, and shall establish their peculiar *dharmas*—Ch. VIII, *v.* 41.

Authority. The king who knows the revealed law, shall know the long continued practices of *Bráhmanas* and other classes, that is *jájana*, &c., the established and continuously observed usages of a country; the rules of traders and the like, and the custom established in a family and continuously observed by it, and shall establish them in civil matters, provided they be not repugnant to the *vedas*; for GOTAMA says:—"The *dharma* (*a*) of a country, class, or family, should be respected when it is not repugnant to the *vedas*."—*Kullúka Bhatta's* commentary on the above text of MANU.

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* See Partition and Precedents, p. 579.

† See Partition and Precedents, pp. 562 *et seqve.*

(*a*) By the word "*Dharma*" is here meant practice, usage, custom, or rule.

But,—

186. The custom which has not been *invariably* observed from time immemorial or for many generations is not to be held as superseding the maxims of the law.* *Vyavasthá.*

187. The prevention of enforcement of a custom or usage by violence or undue means should not, however, be held to be a breach thereof or a break in its observance.† *Vyavasthá.*

188. Where no express law is found, one should be established on approved usage. *Vyavasthá.*

MANU:—The Scripture, the codes of law, approved usage, and (in all indifferent cases,) self-satisfaction, the wise have openly declared to be the quadruple description of the juridical system. Know that system of duties which is revered by such as are learned in the *Vedas*, and impressed (as the means of attaining beatitude,) on the hearts of the just, who are ever exempt from hatred and inordinate affection. Chap. II, *vs.* 1 and 12. Authority.

MANU:—What has been practised by good men and by virtuous *Bráhmanas*, if it be not inconsistent with the legal customs of provinces or districts, of classes and families, let him (the king) establish it.—Chap. VIII, *v.* 46. Authority.

Mahábhárata:—The *Vedas* are different, (*i. e.*, vary from each other), so are the *Smritis* or codes of law; he is not a *Muni* or *Sage* whose doctrine is not different (from those of others); the principle of virtue remains hidden in the cave: the career of great men is *the* (*only*) *path.* Authority.

Skanda Purána:—In respect of any matter, if there is no direct ordinance or prohibition in the *Vedas* or in the Authority.

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* *Vide* precedent, pp. 577, &c.

† *Vide* precedents, p. 579.

[illegible] of law. The law is to be ascertained by reference to the usage of the country and family.

Authority. NÁRADA.—Where two texts of law differ from one another, there the rule founded on usage is recognised to be the law. Usage must be prevalent and the law is thereby ascertained.

Authority. The use of law is only to prevent [illegible] practices at the will of the men of the present generation. Where many texts of law are inconsistent or many interpretations of the same text are contradictory usage alone can be received as a rule of decision. But where no (positive) ordinance is found and there is nothing inconsistent with any known law, in that case approved usage alone must regulate the proceedings. Still however, the example of learned and virtuous *Bráhmanas* should be followed.—Coleb. Dig. Vol. I, Cal. Ed. p. [illegible]

Vyavasthá. **186.** The succession to *ráj* or principality appears to have been regulated by custom prevalent from time immemorial: the eldest succeeds to the entire *ráj* unless he be unfit, when the next qualified brother would succeed.*

Annotations.

186. Wherever a plurality of sons exists, the inheritance descends to them, as *Coparceners*, making together but one heir; like the descent with us, by the common law, to females, or by particular custom, as *gavelkind*, to all the males in equal degree. To this descendibility of estates, by the Hindú law, to all the sons in common, there appears to have been ever, in point of fact, an exception in the case of the Crown; as it is with us, at this day, in the same case, where there are only females to inherit. The exception, arising from the nature of the thing, is noticed by MANU, who speaks of a dying king "having duly committed his kingdom to his son;" a course, which *Jagan-nátha* refers to usage rather than to law.—Stra. H. L. Vol. I, (2nd Ed.) p. 198.

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* *Vide* precedents, pp. 562 *et seq.*

This is manifest from the words of *Bálmiki* put in the mouth of *Manthará* when addresssing (queen) *Koikeí.* "Charming (queen)! It is not that all the sons of a king enjoy the kingdom: one amongst many sons is consecrated to the *ráj*, (for if all the sons be in (possession of) the *ráj*, great disorder shall ensue; therefore, spotless beauty! kings commit the affairs of their kingdoms (respectively) to their eldest or some other well qualified sons, which eldest sons (respectively) deliver their kingdoms entire to their own sons, doubtless to the eldest (sons,) not to their own brethren. Thus your son shall not have much reverence, but as a helpless one, shall be destitute of enjoyment, nor shall he be longer reckoned a member of the ever-enduring royal race."—*Ramáyana, Ayoddhyá Kánda.* Authority.

"But of many sons, one is consecrated to the Empire. If all were kings, it would be the highest injury. Therefore, spotless beauty! kings commit the affairs of Government to their eldest sons, or to others more virtuous. Doubtless they consecrate to the Empire the eldest *by birth or excellence*, and never commit the entire kingdom to his brothers." After commenting on these texts the author of the *Viváda-bhangárnava* puts this question, "May not the middlemost, or other son, be inaugurated?" and himself decides it thus:—"Since the eldest son, being first, cannot be passed over, his consecration is directed; but if he be vicious, another son, who is virtuous, may obtain the kingdom."—*Vide* Coleb. Dig. Vol. II, (Lond. Ed.) p. 123. Authority.

"Among all the sons of *Ikshwáku*, the first-born is king: thou, son of *Raghu*, art first born, and shalt this day be consecrated to the Empire. This prescriptive law in thy family thou canst not now reject."—*Rámáyana, Ayoddhyá-kánda.*—*Ibid.* p. 119. Authority.

When *Pándu* retired to the forest, his kingdom, governed by *Dhrita-ráshtra* fell under the domination of *Duryodhana;* but, recovered by *Bhíma* and his brothers, was enjoyed by *Yudhisthira*, and not shared by his brethren.—*Ibid.* p. 120. Authority.

Therefore, a kingdom is indivisible.—*Ibid.*

Even now it is seen in practice, that entire kingdoms are severally held by one prince, although he have brothers. *Ibid.* p. 119.

In imitation of the above,—

Vyavasthá. **187.** Succession to great landed estates though not independent, but rent-bearing, is also regulated by custom : the eldest, or in case of his being unfit, the next qualified brother, would succeed to the whole.*

Vyavasthá. **188.** If a king give the whole of his dominions to his eldest son qualified for the Empire, although his other sons be void of offence, the gift is valid, provided it be the act of a prince neither insane

Annotations.

187. Upon the same principle of usage, stands, with respect to many of the great zemindaries of Bengal, and other parts of India, at this day, the exclusive succession of the eldest son, or of a *Juba-ráj* (Yuva-Rája, *Juvenis rex*), a young prince, associated to the Empire, as coadjutor to the king, and his designated representative.—Stra. H. L. Vol. I, p. 198.

In the succession to principalities and large landed possessions, long established *Kulâchâr* will have the effect of law, and convey the property to one son to the exclusion of the rest. It has been stated by Mr. Colebrooke, in a note to the Digest (Vol. II. p. 119,) that the great possessions, called *zemindaries* in official language, are considered by modern Hindoo lawyers as tributary principalities. —Macn. H. L. Vol. I, p. 18.

This custom, by which the succession to landed estates invariably devolves on a single heir, without a division of the property, has been recognized and declared legal by Regulation 10 of 1800. A formal enactment was not perhaps necessary as far as the Hindoo law is concerned, *that* law itself providing for exception to its general rules, aud declaring that particular customs shall supersede the general laws.—Note by Macnaughten cited as an authority in the case of *Mahá-Rájkumár Vásdeo Singh* versus *Mahá-Rájá Ruder Singh Báhádur.*—Sel. S. D. A. R. Vol. VII, (New Ed.) p. 301.

* *Vide* Precedents, pp. 562 *et seq.*

nor otherwise disqualified; for it is done in conformity with the practice of former kings (as shown in sacred and popular histories) without offence on the part of their sons or of their father.*

Example. Thus *Dasha-ratha* intended to commit his kingdom to *Ráma*, in the presence of *Vashishtha* and many other sages, and in the presence of the citizens *at large*, although *Bharatha* and his other sons were faultless; but afterwards excluding *Ráma* and the rest, he gave his kingdom to *Bharata*, as a boon to *Koikei*.—Coleb. Dig. (Lond. Ed.) Vol. II, p. 118.

SECTION II.

On Emigrating Families.

189. A family migrating from one country to another is entitled to the benefit of the law of the former country, provided it have uniformly observed the customary ceremonies, and the religious rites ordained by the law, of such country, otherwise it must be subject to the laws of the latter country.† *Vyavasthá.*

190. It has, moreover, been determined that a Hindú family migrating from one country to another must be presumed, until the contrary be proved, to have brought with it its customs and laws on all subjects including marriage, succession, adoption, &c., and the religious rites and ceremonies ordained by that law.‡ *Vyavasthá.*

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* The circumstance of the case of Maháráj Kunwar Vásdeo Singh (Plaintiff) Appellant *versus* Mahá-rájá Rudar Singh Bahádur (Defendant) Respondent, agree with the above *Vyavasthá*. The abstract of the decision passed in the case in question is as follows:—"In a suit for succession to the moiety of the estate of the *Rájá* of *Tirhoot*, the claim was dismissed on the ground that succession devolved upon the defendant in virtue of a deed executed in his favour by the late incumbent, the succession being in conformity with the long established usage of the family, in which the title and estate had uniformly devolved entire for many generations.—Sel. S. D. A. R. Vol. VII, (New Ed.) p. 271.

† *Vide* Precedents, pp. 581 *et seq.*

‡ *Vide* Precedents, pp. 587 *et seq.*

CHAPTER V.

CHARGES ON THE INHERITANCE.

The charges to which inheritance is liable are of three kinds: *First,*—the performance of the obsequies, &c., of the late proprietor and the initiation of his children. *Secondly,*—the discharge of his debts and obligations. *Thirdly,*—maintenance of those persons who were entitled to be supported by the late proprietor and are entitled to maintenance from his assets. Those who take his heritage or assets must discharge the above duties (1).

SECTION I.

ON OBSEQUIES OF THE LATE PROPRIETOR, AND INITIATION OF HIS CHILDREN.

Two motives are indeed declared for the acquisition of wealth: one temporal enjoyment, the other the spiritual benefit of alms and so forth. Now, since the acquirer is dead and cannot have temporal enjoyment, it is right that the wealth should be applied to his spiritual benefit. Accordingly VRIHASPATI says:—"Of the property which descends by inheritance, half should carefully be set apart for the benefit of the deceased owner, to defray the charges of his monthly, six monthly, and annual obsequies."* By

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Annotations.

(1). The charges, to which the inheritance is liable, are of three kinds: *First,*—debts, and other obligations, in the nature of legacies. *Secondly,*—certain specific duties to be provided for out of it, where it has descended to a single heir, and out of the common fund, where it has vested by survivorship in undivided parceners. *Thirdly,*—maintenance of all requiring, and entitled to, it.—Stra. H. L. Vol. I, p. 166.

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* See the case of Sreenarain Roy and another *versus* Bhya Jha. Sel. S. D. A. Rep. Vol. II, (New Ed.) p. 37.

saying "To defray the charges of his monthly, &c., obsequies,"—his participation, and by directing "Religious purposes:" his spiritual benefit, are stated as reasons. So ÁPASTAMBA ordains; "Let the pupil or the daughter apply the goods to religious purposes for the benefit of the deceased." Consequently,—

191. He who inherits or takes the estate of a deceased person must perform his obsequies.* *Vyavasthá.*

GOUTAMA:—Out of the paternal estate, *nava shráddha*† or the obsequies, of the deceased must be performed, the heirs of the deceased being assembled together.—*Smri. Chan.* Chap. II, Sect. ii, Cl. 21. Authority.

SANGRAHA-KÁRA:—Partition subsequent to the demise of the father is to be made after the performance of *Ekoddishta*.‡—*Ibid.*, Cl. 22. Authority.

VRIHASPATI:—A brother, a brother's son, a *sapinda*, or a pupil, performing rites with a funeral cake *for the deceased*, shall thence obtain increase (of prosperity).—Coleb. Dig. (Lond. Ed.) Vol. III, pp. 545, 546. Authority.

Annotations.

191. As with us, necessary funeral expenses are allowed the executor, previous to all other debts and charges, to this place may be referred the duty enjoined by VRIHASPATI to the Hindú heir, of setting apart a portion of the inheritance, to defray, on behalf of the deceased, his monthly, six monthly, and annual obsequies;—on the ground of wealth being intended for spiritual benefit, as well as for temporal enjoyment.—Stra. H. L. Vol. I, p. 170.

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* See *ante*, pp. 137, 138 and Precedents, pp. 307, 613.

† "*Nava Shráddha*" means the first series of *Shráddhas* collectively or funeral offerings on the 1st, 3rd, 5th, 7th, 9th and 11th days after a person's demise.

‡ This is a right performed in honor of the deceased *alone* in contradistinction to *Párvana* or double rite. It takes place at the funeral repast of the eleventh day from the decease. *Vide Dattaka-mímánsá* Sect. IV, § 72, Sect. vi, § 55—Notes.

Authority. KÁTYAYÁNA:—Heirless property goes to the king, deducting, however, a subsistence for the females, as well as the funeral charges: but the goods belonging to a venerable priest (*Srotriya*) let him bestow on venerable priests.—*Vyav. Mayú.* Chap. IV, Sect. viii, § 5.

Authority. The funeral rites of the deceased as far as the tenth day's rites inclusive, must be performed by *that* person (among the heirs) who takes the estate, whoever it may be, (from the wife, downwards), even as far as the king himself.* *Ibid.* § 29.

Authority. Even thus VISHNU says:—"He who is heir to the estate, is the giver of the funeral oblations." This same matter has been fully explained by me in the *Shráddha-Mayúkha* in determining the order of those entitled to perform them.—*Ibid.* § 29.

192. But if one be heir to the estate, and another be qualified to perform the *shráddha*, he must give sufficient property and cause the rites to be celebrated by him who is qualified to perform them.†

Authority. Even the king has competency for the performance of (the deceased's) *Shráddha.* In short, in default of all, the king should cause the *Shráddha* of the deceased to be performed out of his inheritance. Thus according to the *Márkandea Purána* the king also has competency for the performance of *Shráddha.*—*Nirnoya-Sindhu,* Section 3rd, leaf 22.

Illustration. How can the spiritual preceptor, who takes the estate of a *Kshatriya,* perform his funeral rites, since *that* is forbidden in the text:—"The priest who performs the funeral rites for persons of an inferior tribe is degraded to that class in the present world and in the next?" No, for this text relates to brothers unequal in class and the difficulty is

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* In Bombay the eldest son of a deceased Hindú defrays all expenses consequent on his father's death and deducts the amount from the estate, dividing the balance equally among the other sons.—*Rookmineе* v. *Toocram* 1 Borr. 124.—Note by Stokes.

† Coleb. Dig. (Lond. Ed.) Vol. III, pp. 545, 546. *Vide* Precedents, pp. 307, 311.

obviated by saying, that the spiritual preceptor may accomplish the funeral rites by the intervention of a qualified person equal in class with the deceased (1).—Coleb. Dig. Vol. III, (Lond. Ed.) pp. 545, 546.

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193. The initiatory ceremonies of the un-initiated brother and sister must be performed out of the patrimony by their brother or brothers who have been already initiated. *Vyavasthá.*

VYÁSA:—For any of the brothers, whose investiture and other sacraments had not been performed, the other brothers, of whom the sacraments have already been completed, shall perform those ceremonies out of the paternal estate: and for unmarried sisters, the sacraments shall be completed by their elder brothers, as the law requires.* *Vi. Chi.* p. 247. Authority.

NÁRADA:—For those whose initiatory ceremonies have not been regularly performed by the father; those ceremonies must be completed by brethren out of the patrimony.—*Smri. Chan.* Chap. iv, cl. 40. Authority.

Annotations.

(1). It is not a maxim of the law, that he who performs the obsequies is heir; but that he who succeeds to the property must perform them. (3 Dig. texts cccclv, ccccl vii.)—Colebrooke's opinion. See Stra. H. L. Vol. II, (2nd Ed.) p.242.

193. Not less obligatory upon the heirs is the charge for the *initiation* of the un-initiated, and the *marriage* of the unmarried members of the family.—The duty of initiating attaches to those who have themselves been initiated; and the provision for it is to be made before partition, out of the common stock. It has been already intimated, that charges of this nature, to be available against the inheritance, must be reasonable; though this is seldom attended to. They regard brothers and sisters only, not extending to collaterals.—Stra. H. L. Vol. I, (2n Ed.) pp. 170, 171.

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* The reading of the above text is somewhat different from that cited in the *Smriti-chandriká*. See post page 235.

Authority. VRIHASPATI :—For younger brothers, whose investiture and other ceremonies have not been performed, their elder brothers (*a*) shall perform them out of the collected wealth of the father.—*Smri. Chan.* Chap. IV, Cl. 38. *Vyav. Mayú* Chap. iv, Sect. iv, § 38.

(*a.*) In this text,—"Brothers" means brothers whose father is dead. "Whose investiture and other ceremonies have not been performed :] Add to these words, the phrase—"by the father."—*Ibid.*

The mention of brother, brings in sisters also. Even so the same author :—

Authority. VRIHASPATI :—And those unmarried daughters who are as yet uninitiated, must be initiated, by their eldest brother, even out of the father's wealth, according to the (usual) rite.—*Vyav. Mayú.* Chap. IV, Sect. iv, § 39.

Vyavasthá. YÁJNAVALKYA :—Uninitiated brothers should be initiated by those, for whom the ceremonies have been already completed. But sisters should be disposed of in marriage, giving them as an allotment, the fourth part of a brother's own share,—*Vyav. Mayú.* Chap. IV, Sect. iv, § 40,—*Mit.* In. Chap. I, Sect. vii, § 2, 3.

Authority. VIJNYÁNESHWARA :—By the brethren who make a partition after the decease of their father, the un-initiated brothers should be initiated at the charge of the whole estate. In regard to the unmarried sisters, the author (*Yájnavalkya*) states a different rule : "But sisters should be disposed of in marriage, giving them as an allotment, the fourth part of a brother's share (1)."—*Mit.* In. Chap. I, Sect. vii, paras 4, 5. *Vide* Partition.

Annotations.

(1.) VIJNYÁNESHWARA allots to an unmarried sister a quarter of a share. (Mit. on Inh. Chap. I, Sect. ii § 5 *et. seq.*) But the *Chandriká* and *Mádhavya* countenance the opinion that the specified allotment intends only a sufficiency for the charges of the sister's nuptials ; and their authority has been very properly followed in the one here delivered.—Colebrooke's opinion.—*Vide* Stra. H. L. Vol. II, (2nd Ed.) p. 313.

MANU:—To the unmarried daughters (by the same mother), let their brothers give portions out of their own allotments (*a*) respectively, (according to the classes of their several mothers): let each give a fourth part of his own distinct share; they, who refuse to give it, shall be degraded.—*Vi. Chi.* p. 248. Authority.

(*a*) '*Their own allotments*' means the allotment of brothers. Therefore the meaning is that a quarter of the share ordained for a brother of the class to which she belongs should be given to a maiden sister.—*Vi. Chi.* p. 248.

Here the giving of a quarter share is not intended; but property sufficient to defray the expenses of the nuptials should be given, the same being ordained by VISHNU. The same opinion of the subject is held by *Ratnákara* and in other books.—*Vi. Chi.* p. 248. Authority.

VISHNU:—The initiations of unmarried daughters are to be performed in proportion to his wealth.—*Vi. Chi.* page 248.—*Vide Smri. Chan.* Chap. IV, Cl. 36. Authority.

194. If only one son is heir, he also must initiate his uninitiated brother and sister out of the patrimony inherited by him. *Vyavasthá.*

The *shráddha, &c.*, of the late proprietor and the initiatory (nuptial) ceremony of the daughter should be provided out of the inheritance where it has descended to a single heir.—Coleb. Dig. (Cal. Ed.) Vol. I, p. 226. Authority.

The text of VISHNU:—"The initiations of unmarried daughters are to be performed in proportion to his own wealth,"—is applicable either to a case where no partition of heritage takes place from there being an only son, or to a case where brothers live in union.—*Smri. Chan.* Chap. iv, Clause 36. Authority.

The use of the word "daughters" in the foregoing text is also intended to include the case of the unmarried *sons* of the father. Hence VYÁSA:—"Brothers whose investiture and ceremonies have not been performed, are to be initiated in due time from the paternal wealth alone by Authority.

brothers, whose sacraments have already been completed. Unmarried sisters are also to be initiated by their elder brothers according to law."—*Smri. Chan.* Chap. iv, Cl. 37. However,—

Vyavasthá. **195. Brothers and sisters only are entitled to be initiated out of the undivided patrimony, and not others.**

Vyavasthá. **196. If there be no patrimony, the initiated brothers must, even out of their own funds, perform the initiatory ceremonies of their un-initiated brothers and sisters.**

Authority. NÁRADA:—If no wealth of the father exists, the initiatory ceremonies must, without fail, be performed by the brothers already initiated, contributing funds out of their own portions.—*Smri. Chan.* Chap. IV, Cl. 41.

The ceremonies contemplated by this text commence with *játa-karma** and end in *upanayana* (1).†—*Smri. Chan.* Chap. iv, Cl. 42.

Annotations.

195. See Mit. on In. ch. i, Sect. iv, § 19. See Id. Ch. i, Sect. v, § 2. See Id. Ch. i Sec. vii, § 4. Where the initiatory ceremonies, terminating with marriage, are directed to be performed for brothers, but without any mention of nephews.—Colebrooke's opinion. Stra H. L. Vol. II, (2nd Ed.) p. 287.

(1) The sacraments or initiatory ceremonies that must be performed by brothers are as follow:—1. *Játa-karma*, 2. *Náma-karana*, 3. *Nishkramana*, 4. *Anna-prásana*, 5. *Churá-karana*, 6. *Upanayana* and 7. *Viváha*. All of these ceremonies, however, concern men of twice born classes; they do not concern men of the fourth class,

* A ceremony ordained on the birth of a male child, before the cutting of the navel string, and which consists in making the child taste clarified butter out of a golden spoon.

† Investiture of the three first classes with their characteristic sacred threads.

The word "ceremonies" takes here the above limited sense as the text says "must without fail be performed," and as marriage, &c., are not ceremonies that must, *without fail*, be performed, the law permitting the life of celibacy to a perpetual student (*noishthika Brahma-chári*).—*Ibid.* Cl. 42.

In the case of daughters, however, the word "ceremonies" used in the text (Cl. 41) denotes marriage, there being no *Upanayana* for them. If there be no patrimony, the marriage must be performed by the contribution of funds of their brother's own estate, marriage with females taking the place of "*Upanayana*" with males, as such being indispensable.—*Smri. Chan.* Chap. IV, Cl. 44. Authority.

The authors consider the portion assigned as intended only for indispensable sacraments.—Coleb. Dig. Vol. III, pp. 95-100. And,—

197. Where a person other than a son inherits the property of the late owner, he also has to perform the initiatory ceremonies of the un-initiated son and daughter of the deceased, just as he has to perform his (the deceased's) funeral obsequies.* *Vyavasthá.*

The inference is the same when any other succeeds, (to the estate of the deceased). See Coleb. Dig. Vol. III, (Lond. Ed.) p. 461.

See the duties of a widow to her deceased husband. *Ante,* pp. 134—138.

Annotations.

that is the *Shúdras*. Marriage is the only sacrament for a man of the servile class. Thus *Brahma Puráṇa*: "A man of the servile class universally obtains marriage as his only sacrament." The word "universally" denotes that marriage alone is constantly required. It should, however, be observed that to acquire the rank of *Sat* (pure) *Shúdra*, it is necessary for the offspring of a respectable *Shúdra* to perform the tonsure and other ceremonies.—Coleb. Dig. Vol. III, pp. 95—104.

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* See *ante* pp. 231, 232, and precedents, pp. 311, 316, 611.

SECTION II.

On Payment of Debts.

Authority. YÁJNAVALKYA :—Let sons divide equally the assets and the debts after the demise of their parents.—*Smri. Chan.* Chap. II, Sect. ii, Cl. 18;—*Mit. Sans.* p. 178.

The debts referred to in this passage are debts contracted by the father; for as respects debts not contracted by the father, the rule is that they should be discharged at the very time of partition.—*Ibid.* Accordingly,—

Authority. KÁTYÁYANA :—A debt contracted by a brother, a paternal uncle, or a mother for the support of the family, must be fully discharged by the co-heirs when partition is made.* *Smri. Chan.* Chap. II, Sect. ii, Cl. 19.

But NÁRADA says that the debts contracted by the father should also be paid at the time of the partition. His passage is†—

Authority. "What remains of the paternal estate after paying off the debts of the father, shall be divided among the brothers. Otherwise, the father continues a debtor."†

Authority. SANGRAHA-KÁRA, too :—Partition subsequent to the demise of the father is to be made after the performance of *ekoddishta.*‡—*Ibid.*, Cl. 22.

Authority. From all the above texts, it is to be understood that if the paternal wealth be such as to leave a surplus after defraying the expenses of *nava shâradha* and discharging the debts contracted by the father, &c., the course prescribed by NÁRADA (as above) is to be observed. If not, the direction contained in the text of YÁJNAVALKYA (above cited), is to be followed. So,—

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* As to debts incurred by a manager and the distinction when one of the members is a minor. See 6 Moo. I. A. p. 393, and 1, M. H. C. R. p. 398.

† *Smri. Chan.* Chap. II, Sect. ii, Cl. 20.

‡ See *Ante* page 231.

According to the *Smriti Chandriká*,—

198. If the patrimony be such as to leave a surplus after defraying the expenses of *nava shráddha** and discharging the debts of the father or the like, the sons in pursuance of the above text of NÁRADA should divide it among themselves, otherwise, they should divide among them both the debts and assets as directed by YÁJNAVALKYA. But if there be a debt contracted for the family by any other member of it than the father, it must be discharged by them at the time of partition, as ordained by KÁTYÁYANA. *Vyavasthá.*

But the general *Vyavasthá* is, that—

199. The heir of a deceased person receiving his heritage must pay his debts.† *Vyavasthá.*

YÁJNAVALKYA:—He who has received the estate, must pay the debts of it; and in like manner, he who takes the wife (of the deceased); or the son, whose (father's) assets are not held by another (*ananyáshrita*): but of one having no son, the other heirs (*rikthinah*) must pay debts.—*Mit.* (Sans.) p. 75.—*Vyav. Mayu.* Chap. V, Sect. iv, § 16. Authority.

Annotations.

198. The course for the payment of debts, on partition, may be either by disposing of a sufficient part of the property for the purpose, and thus paying them off at once; or, by apportioning them among the parceners, according to their respective shares;—an arrangement, which, to be binding upon creditors, would require their assent.—Stra. H. L. Vol. I, (2nd Ed.) pp. 168, 169.

199. The most general position respecting it is, that debts follow the assets into whosesoever hands they come. The obligation to pay attaching, not upon the death only of the ancestor, but on his becoming an anchoret, or having been so long absent from home, as to let in a presumption of death.—Stra. H. L. Vol. I (2nd Ed.) page 166.

* See *ante* p. 231.

† *Vide* Precedents pp. 614—625.

Authoriry. YÁJNAVALKYA :—Daughters share the residue of their mother's property, after payment of her debts.—*Mit.* In. Chap. I, Sect. iii, § 8.

Authority. VISHNU :—He who takes the assets of a man leaving no male issue, must pay the sum due (by him).—Coleb. Dig. Vol. I, p. 329.

Authority. NÁRADA :—A childless widow must pay the debt of her sister enjoining payment, or whoever receives the assets left by that sister, must pay her debts.—*Ibid.*, p. 323.

Vyavasthá. **200. Even if no inheritance be received, still sons are to pay their father's debts or divide the same among them in due proportions, and the grandson also is to pay such debts but without interest, but the great-grandson, like the widow and other relatives, is not to pay them without inheriting the debtor's property.***

Annotations.

200. The great-grandson of the original debtor shall not be compelled to pay his debts, unless he take the assets. In what circumstances is he considered as holding the assets ? Is it only when he becomes the (*immediate*) heir of his ancestor, who has survived his own son and grandson ? Or (is he) likewise (considered as such) when the son succeeded to the estate on the death of the proprietor, and after him the grandson; and on his demise the great-grandson ? The answer is, when the estate of the ancestor passes successively to his son, grandson and great-grandson, this last is not the (immediate) heir of his grandfather, but of his own father. Consequently he, who succeeds to the estate of another in right of his relation to him, is considered as holding assets of that person.—Coleb. Dig. Vol. III, pp. 87, 88.

Thus the great-grandson should pay his great-grandfather's debts, which have remained undischarged, as such debts were to be paid by his father as well as grandfather.

200. But, to the Southward, the doctrine of the *Mitákshará*, supported by the *Mádhavya* and *Chandriká*, is said to render the

* *Vide* Precedents, p. 624.

The meaning is that if the great-grandson and the rest take the inheritance, then they must pay the debts (of the ancestor), and not otherwise; but it has been declared that the son and grandson are to be made to pay the debts even if they did not receive the inheritance. Thus NÁRADA:—"An undisputed debt of the grandfather, which has been successively due by him and his sons, but has remained undischarged by them, shall be paid by the grandsons; but it is not recoverable from a person, who is fourth (in descent from the debtor.)"—*Mit. Sans.* p. 78.—*Vide* Coleb. Dig. Vol. I, p. 309.

It (the debt) is not to be paid by the great-grandson, the wife or the others, if they have not taken the estate.—*Vyav. Mayu.* Chap. V, Sect. iv, § 17. **Authority.**

KÁTYÁYANA:—If any debts exist against the father, his son shall not take possession of his effects. They must be given to his creditors, and if he die (*without*) wealth (*a*), still his son must pay his debts.—*Vyav. Mayu.* Chap. V, Sect. iv, § 14. **Authority.**

(*a*) "*Wealth*" must be connected with '*without*.'—*Ibid.*

NÁRADA:—"A father being dead, his sons, whether after partition or before it, shall discharge his debt in proportion to their shares, or that son alone, who has taken the burthen upon himself." Here although it is said without distinction that sons and grandsons should pay debts, yet this ought to be understood to be the difference that the son should pay them with interest just as his father would have paid, but the grandson should pay them only equal to the principal and not interest (thereon).—*Mit. Sans.* p. 75. **Authority.**

VRIHASPATI:—Sons must pay the debt of their father, when proved, as if it were their own (that is with interest); **Authority.**

Annotations.

payment of the father's debts with interest, and the grandfather's without interest, independent of assets, a legal, as well as sacred obligation.—Stra. H. L. Vol. I, p. 167.

the son's son must pay the debt of his grandfather (but) equal (to the principal); and his son (that is the great-grandson,) shall not be compelled to discharge it [unless he be heir, and have assets (*b*)."—*Vyav. Mayu.* Chap. V, Sect. iv, § 12. *Mit. Sans.* p. 75.

Authority. (*b*). "Equal"—that is as much as was borrowed and not interest. His son that is the great-grandson who has not received inheritance should not pay.—These three (namely) the debtor, his son, and grandson are shown to be the payers of debts—and in the case of (all of) them happening to be in existence, the grade is also shown.—*Mit. Sans.* p. 75.

Authority. VRIHASPATI :—The father's debt must be first paid, and next the debt contracted by the man himself; but the debt of the paternal grandfather must even be paid before either of those.*—*Vyav. Mayu.* Chap. V. Sect. iv. § 14.

Authority. KÁTYÁYANA :—After the death of his father, debts (of his grandfather) must be carefully discharged by the grandson; but a debt contracted by an ancestor is not recoverable from the fourth in descent.—Coleb. Dig. Vol. I, page 309.

Authority. KÁTYÁYANA :—The rule shall be the same in regard to the debts of the grandfather, which have not been discharged by (other) grandsons, nor by his own sons, but a debt of the grandfather shall not be paid by his grandsons with interest.—Coleb. Dig. Vol. I, (Cal. Ed.) page 308.

In fact, debts of the paternal grandfather become debts of the father: they are chargeable on him in the first place, next on his son, as has been already noticed: but the great grandson of the original debtor shall not be compelled to pay the debts unless he take the assets.—Coleb. Dig. Vol. III., (Lond. Ed.) page 87.

But even if the son did not inherit his father's property, still it is his sacred obligation and moral duty to pay his debts; for, (says)—

* *Vide* Coleb. Dig. Vol. I, page 273.

NÁRADA :—" Fathers desire male offspring for their own sake, (reflecting) this son will redeem me from every debt whatsoever due to superior and inferior beings, therefore, a son begotten by him, should relinquish his own property and assiduously redeem his father from debt, lest he should fall into a region of torment. If a devout man, or one who maintained sacrificial fire, die a debtor, all the merit of his devout austerities, or of his perpetual fire, shall belong to the creditors."* Authority.

VRIHASPATI :—He who having received a sum lent or the like does not repay it to the owner, will be born here in his creditor's house, a slave, a servant, a woman, or a quadruped. "* Authority.

201. Whatever the father had promised to give, whatever he had mortgaged, or whatever price he did not pay after purchasing (a thing), all these should be discharged by the son. *Vyavasthá.*

HÁRÍTA :—A promise made in words but not performed in deed, is a debt (of conscience) both in this world and in the next. He who gives not what he has promised, and he who takes what he has given, sinks to various regions of torment, and springs again to birth from the womb of some brute animal.—Coleb. Dig. Vol. III, Chap. VIII. Authority.

KÁTYÁYANA :—What a man has promised in health or in sickness, for a religious purpose, must be given ; and if he die without giving it, his son shall doubtless be compelled to give it.—*Ibid.*, p. 307. Authority.

Annotations.

201. Connected with the above duty, is the discharge of obligations, resting on the intention of the deceased, sufficiently manifested; since, though nothing occurs in the Hindú law expressly in favor of the testamentary power, as exercised under other codes, it provides distinctly for the performance of promises by the ancestor in his life-time, to take effect after his death.—Stra. H. L. Vol. I, (2nd Ed.) page 169.

* *Vide* Coleb. Dig. Vol. I, p. 299 *et seq.*

Authority. KÁTYÁYANA :—That must be paid, which may have been verbally promised, as well as what has been engaged for to another.—*Vyav. Mayú.* Chap. V, Sect. iv, § 20.

Authority. KÁTYÁYANA :—The judge shall compel a son to pay the debt of his father, provided he be involved in no distress, be capable of property, and liable to bear the burthen; but in no other case shall he compel the son to pay his father's debts.—*Vyav. Mayu.* Chap. V, Sect. iv, § 19.

But,—

Vyavasthá. **202.** Although a son and grandson are to pay the debts incurred by their father and grandfather, yet they should not pay such of their debts as were contracted for immoral uses, or a fine or tolls, or sums for which they were sureties.*

Authority. VRIHASPATI :—The sons are not compellable to pay sums due by their father for spirituous liquors, for losses at play, for promises made without any consideration, or under the influence of lust or wrath, or sums for which he was a surety, or a fine, or a toll, or the balance of either.—Coleb. Dig. Vol. I, page 312.

Authority. YÁJNAVALKYA :—A son need not pay in this world money due by his father for spirituous liquors, for lustful pleasures, for losses at play; nor what remains unpaid of a fine or toll; nor any thing idly promised.—*Ibid.* p. 318.

Authority. The debt which is incurred by drinking spirituous liquors, or for loss at play, the balance of a fine or toll, and what is uselessly given,—that is what is promised to swindlers, flatterers, wrestlers and the like—such debts contracted by a father should not be paid by his son and the rest,—to liquor sellers and the like. Here the expression "balance of a fine or toll" being used, it must not be understood that the whole thereof is payable.—*Mitáksharà, Sans.* p. 71.

Authority. USHANÁ :—A fine, or the balance of a fine, as also a bribe or toll (*shulka*), or the balance of it, are not to be paid

* *Vide* Precedents pp. 63—78,176.

by the son, neither shall he discharge debts improper (not sanctioned by law or custom).—*Vyav. Mayu.* Chap. V, Sect. iv, § 15.—*Mit. Sans.* p. 71.

GOTAMA:—Spirituous liquors, tolls or bribes, and fines do not become burthens upon sons: by this it is declared that they are not to be paid.—*Mit. Sans.* p. 72. Authority.

KÁTYÁYANA:—BHRIGU ordains, that a debt devolving from the grandfather, which was proved, and acknowledged by the father, must be discharged by grandsons, if it were not contracted for immoral uses, nor already paid by the sons. A debt of the paternal grandfather, which is proved, or which is partly liquidated, must be discharged (by the grandson;) but never shall a debt, contracted for immoral uses, or which was contested by his father, (be paid by the grandson).—Coleb. Dig. Vol. I, pp. 307, 308. Authority.

Although according to the foregoing texts of our holy Legislators, a son and son's son even without receiving inheritance, should pay such debts of their father and grandfather as were not contracted for immoral uses and for purposes as aforesaid, yet it has been decided and determined by the British Dispensers of justice, that—

103. The debts of a deceased person follow his assets,—his heir is to pay his debts in proportion to the property inherited by him; and in the case of his not getting or taking the deceased's heritage, he is not legally bound to pay his debts nor he can be compelled to pay the same.* *Vyavasthá.*

Annotations.

103. It has, however, been held in Madras that a son is liable for his father's debts only to the extent of the property inherited by him from the latter. S. A. No. 12 of 1851, Mad. S. D. 1851, p. 13. And it would seem that the precept in the text is, like so many others, merely moral and directory, and not imperative. Colebrooke cited in 2. Stra. H. L. p. 75.—Note by Stokes, see his edition of the *Vyavahára Mayúkha*, p. 123.

* *Vide* Precedents, pp. 614—625.

Authority. The doctrine of the *Shástra* is, however, different from the above: so NÍLA-KANTHA:—"But receipt of ever so small a portion of the estate, imposes the liability of liquidating the debts, to whatever amount (they may be)." (1)—*Vyav. Mayú.* Chap. V, Sect. iv, §17.

Vyavasthá. **204. A minor son, although he inherited property from his late father, is not at *that age* bound by the *Shástra* to pay the debt of his father, but upon coming of age.* (See minority.)**

Sons while minors are not also under the religious obligation to pay their ancestors' debts, but it has been enjoined that they shall pay the same at their full age. Thus—

Authority. KÁTYÁYANA:—On the death of a father his debt shall in no case be paid by his sons incapable from nonage of conducting their affairs; but at their full age they shall pay it in proportion to their shares.†

Authority. "The father, or (if the family be undivided) the uncle or the elder brother having travelled to a foreign country, the

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Annotations.

103. Much as is said everywhere of the religious tie the son is under, to pay the debts of his ancestor, it seems settled in Bengal, that it has no legal force independent of assets. But to the Southward, the doctrine of the *Mitákshará*, supported by the *Mádhavya* and *Chandriká*, is said to render the payment of the father's debts with interest, and the grandfather's without interest, independent of assets, a legal, as well as a sacred, obligation.—Stra. H. L. Vol. II, (2nd Ed.) p. 167.

(1) Colebrooke in his Treatise "On Obligations and Contracts" (chap. ii, para. 51) has laid it down that—'heirs succeed to the obligations of ancestors without any reference to the adequacy of the property, and the rights of inheritance must be relinquished, where its obligations are repudiated.

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* *Vide* Precedents, page 625.

† See Coleb. Dig. Vol. I, p. 298.

son shall not be forced to discharge the debt until twenty years have elapsed." Upon (the ancestor's) death also, a minor will not pay (his debt), but when he attains majority, he must pay it.—*Mit. Sans.* p. 74.

Although after the death of the father, even (his) infant (son) becomes independent, yet he is not bound to pay debts. So it is said:—"He who is under age, is not bound to pay debts even though he be independent."—*Mit. Sans.* page 74. Authority.

It has, however, been determined by the British Dispensers of justice, that—

205. Debts follow the assets. Although the heir be a minor, yet the creditor of his ancestor can realize the amount due to him, from the property inherited by the minor.* *Vyavasthá.*

206. If a person after dividing his estate and debts amongst his sons, be separate from them taking his portion, and beget another son, then the son begotten after partition shall inherit the father's property, both reserved and subsequently acquired, and pay his (portion of the) debts.† *Vyavasthá.*

VRIHASPATI:—All the wealth which is acquired by the father himself who has made a partition with his sons, goes to the son begotten by him after the partition. Those born before it are declared to have no right as in the wealth, so in the debts likewise, and also in gifts, pledges and purchases.† Authority.

The meaning is that—as the son begotten after partition is to receive the property of his father acquired after partition, so also is he to liquidate his father's debt contracted after partition. In like manner, whatever the father had

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* *Vide* Precedents, pp. 614, 618, 619, 625.

† See Partition for the Son begotten after partition.

promised to give, whatever he received in deposit, whatever he mortgaged, or whatever price he did not pay after purchasing (a thing,) all these should be performed by him alone.

Vyavasthá. **207.** If a person after contracting a debt remain abroad for twenty years (c), his debt shall, after that period, be paid by his son, grandson, or the person who took his property.

(c) This must be understood when the return of the absent (parent) may be expected. But, if the return of the absent parent is impracticable, the son shall pay the debt of his father though living, as if he were dead.—Coleb. Dig. Vol. I, page 285.

Vyavasthá. **208.** If a person be incapacitated by old age, by long or incurable disease, by being wholly involved in distress, &c., or for any other reason, his son or another who manages his property, must pay his debts.

Debts must be paid by the sons, or other relatives, when they have reached their twentieth year, for, says*—

Authority. NÁRADA:—The father, or (if the family be undivided) the uncle or the elder brother, having travelled to a foreign country, the son shall not be forced to discharge the debt until twenty years have elapsed.*—

Authority. VISHNU:—If he, who contracted the debt, should die or become a religious anchoret or remain abroad for twenty

Annotations.

208. It is not expressly said that the debt shall be paid by the son, in the life-time of his father, who is insolvent. It is declared, however, that he shall pay the debt of the father who is oppressed by calamity, such as incurable disease, &c., and that, even though no patrimony have come into his hands. But, according to the remark of Sir William Jones, the obligation is moral and religious, not civil. See note on Jagan-nátha, Dig. b. i, clxvii.—*Stra.* H. L. Vol. II, pp. 277, 278.

* *Vyav. Mayú.* Chap. V, Sect. iv, § 13.

years (b), that debt shall be discharged by his sons or grandsons, but not by remoter descendants against their will.—*Vyav. Mayú.* Chap. V, Sect. iv, § 13.

YÁJNAVALKYA :—The father having gone to a foreign country, or deceased (naturally or civilly,) or wholly immersed in vices (or difficulty,) the sons or their sons must pay the debt, but, if disputed, it must be proved by witnesses.—*Vyav. Mayú.* Chap. V, Sect. iv, § 12. Authority.

KÁTYÁYANA :—If the father be at home, but afflicted with a chronic disorder (though not without hope of recovery), or absent, his debt shall be paid by his sons, after a lapse of twenty years (b).—*Vyav. Mayú.* Chap. V, Sect. iv, § 13. Authority.

(b) This must be understood when the cure of the diseased is possible, or when the return of the absent (parent) may be expected. But when the distemper is deemed incurable or the return of the absent parent is impracticable, the son shall pay the debt of his father, though living, as if he were dead. The creditor need not wait twenty years.—*Ratnákara. Vide* Coleb. Dig. Vol. I, (Cal. Ed.) p. 285.

KÁTYÁYANA :—The debts of men long absent in a foreign country, of idiots, madmen, and the like, who have no male kindred, and of religious anchorets, must be paid even during their lives, by such as have the care of the (debtors') wives and goods.—*Ibid.* p. 338. Authority.

KÁTYÁYANA :—A creditor may enforce payment of such debts from the sons of his debtors, who, though alive, are incurably diseased, mad, or extremely aged (c), or have been very long absent in a foreign country, (provided the sons have assets of the debtors).—*Ibid.* p. 286. Authority.

(c) "Extremely aged"—that is incapacitated by old age for the (management of) affairs.—*Ibid.*

VRIHASPATI :—A debt of the father being proved, it must be discharged by his sons, even in his life-time, if he were blind (or deaf) from his birth, or be degraded, insane, or afflicted with phthisis or leprosy, or any hopeless disorder.—*Ibid.* p. 285. Authority.

Authority. HÁRÍTA :—While the father lives, sons are not independent in regard to the receipt and expenditure of wealth, and amercement (*ákshepa*). But if he be decayed, remotely absent, or afflicted with disease, let the eldest son manage the affairs as he pleases.—*Smri. Chan.* Chap. I, Cl. 21, 30.

Authority. SHANKHA and LIKHITA :—If the father be incapable, let the eldest son manage the affairs of the family, or, with his consent, a younger brother conversant with business.—*Smri. Chan.* Chap. I, Cl. 28.

Vyavasthá. **209. The debt contracted for the family by any person connected with the family, even by a pupil, a dependant or the like, if not repaid by the *Kartá** of the family, must be liquidated by his surviving son, grandson, or the person inheriting his property—the same in fact being a debt of the *Kartá* himself.†**

Authority. VISHNU :—A [debt (*d*)] of which payment was] previously promised, or (which was) contracted by any person for the sake of the family, must be paid by the house-keeper. Coleb. Dig. Vol. I, p. 302.

(*d*) A "debt" must be here supplied.—*Ibid.*

Authority. YÁJNAVALKYA :—If one of (two or more) undivided kinsmen contract a debt for the sake of the family (*kutumbárthé*), and either die or be very long absent abroad, the other parceners or joint tenants shall pay it.—*Mit. Sans.* p. 70. *Vide* Coleb. Dig. Vol. I, p. 290.

Authority. The debt which was contracted by several undivided members, or any member, of a family, for the sake of such family (*kutumbárthé*), should be paid by the head of the family, but upon his death or being absent abroad, the same should be liquidated by all those who inherited his property.—*Mit. Sans.* p. 70.

* The doer of a thing, agent, master, chief, head, governor.

† *Vide* Precedents, pp. 614, 620, 621.

Remark.—The term '*Kutumbárthé*' which is composed of '*Kutumba*' (family) and *arthe* (for or for the sake of,) is used in many texts on the above subject. Mr. Colebrooke in his Digest has rendered the term sometimes by 'for the support of the family' sometimes by 'for the use of the family,' sometimes by 'for the behoof of the family' and sometimes by 'for the benefit of the family' and in so doing he seems to have followed *Jagan-nátha* whose compilation is the original of his Digest. Sir William Jones, in one text of Manu, translates it by 'for the use of the family' and in another by 'for the behoof of the family' without following the commentator *Kullúka Bhatta*, who in one text has interpreted it '*Kutumba-sambardhanárthaṁ*' (for the support of the family,) and in another by '*Kutumba-byaya-nimittam* (for the expenses of the family.') With due deference to the two great translators, I have deemed it best to render the term '*Kutumbárthé*' all along by 'for the sake of the family,' a signification consistent with the component parts of the original, and most accurate of all, and which has been afterwards adopted by Mr. Colebrooke himself in his translation of the *Mitákshará*.—V. D. p. 357.

KÁTYÁYANA :—A debt contracted by a brother, a paternal uncle, or a mother for the sake of the family, must be fully discharged by the co-heirs when partition is made.—*Smri. Chan*. Chap. II, Sect. ii, Cl. 19. Authority.

VRIHASPATI :—A house-keeper shall discharge a debt contracted by his uncle, brother, son, wife, servant, pupil, or dependants, for the support of the family (during his absence).*—Coleb. Dig. (Cal. Ed.) Vol. I, p. 301. Authority.

It is here implied that, a debt, contracted even by others for the support of the family, must be discharged by the house-keeper.—*Ratnákara*. *Vide* Coleb. Dig. Vol. I, (Cal. Ed.) page 301.

* The principle of the law may be here stated : should a son competent to affairs be at hand, a debt, contracted by divided brethren or the like unauthorised by him, is not valid : but, in the case of parceners, if any one of five brothers forbids the contracting of the debt, and is able to support the family by other means, the debt contracted by another brother, is due by the borrower alone, and shall not be paid by him who opposed the debt. Yet, if the money (so) borrowed be used by him who opposed the debt, or by his dependant, being unable to supply sufficient funds for the support of the whole family, or of his immediate dependants, it must be discharged by him.—Coleb. Dig. Vol. I, p. 301.

Authority. NÁRADA:—Whatever debt has been contracted for the use of the family, by a pupil, an apprentice, a slave, a wife, or an agent, must be paid by the head of the family. Coleb. Dig. (Cal. Ed.) Vol. I, p. 302.

Authority. KÁTYÁYANA:—BHRIGU ordained that a man shall pay a debt contracted for the sake of the family, in his remote absence, even without his assent, by his slave, his wife, his mother, his pupil, or his son.—Coleb. Dig. (Cal. Ed.) Vol. I, p. 17.—See *Vyav. Mayú.* Chap. V, Sect. iv, § 20.

Authority. NÁRADA:—A debt contracted before partition by an uncle, or brother, or a mother for the support of the family, all the persons or joint tenants shall discharge.—Coleb. Dig. (Cal. Ed.) Vol. I, p. 292.

Authority. MANU:—If the debtor be dead (*e*), and if the money borrowed was expended for the use of the family, it must be paid by that family, divided or undivided, out of their own estate.—*Ibid.* p. 297.

(*e*) The word "dead" is illustrative (of civil death and the like).—*Ibid.* p. 297.

Authority. MANU:—Should even a slave make a contract (*f*) (in the name of his absent master,) for the sake of the family, that master, whether in his own country or abroad shall not rescind it.—*Ibid.* p. 302.

(*f*) "A contract"—that is debt.

Vyavasthá. **210. NÁRADA:—A father must equally pay the debt of his son, contracted by his own appointment, or for the support of his family, or in a time of distress.—Coleb. Dig. Vol. I, (Cal. Ed.) p. 305.**

Vyavasthá. **211. NÁRADA:—A debt contracted by the wife, shall by no means bind the husband, unless it were (for necessaries) at a time of distress: a man is indispensably bound to support his family.—*Ibid.* p. 321.**

212. If a debt be contracted by a widow or the like for the liquidation of the debts of the late owner, or for the performance of an act or acts indispensably necessary, such debt must be discharged by the reversionary heirs of the late owner.* *Vyavasthá.*

213. The debt contracted by any of the co-heirs or co-parceners of a joint family—such as a father, son, brother, brother's son or the like,—for the support of the family, or for relieving it from distress, or for the performance of the act or acts indispensably necessary, must be repaid by all the surviving co-heirs or co-parceners of the family.† *Vyavasthá.*

NÁRADA.—Any one surviving parcener may be compelled to pay another's *share of a* debt contracted by joint tenants; but if they be dead, the son of one is not liable to pay the debt of another.—Coleb. Dig. Vol. I, p. 295. Authority.

NÁRADA :—A debt contracted before partition by an uncle or a brother, or a mother, for the sake of the family, all the parceners or joint tenants shall discharge.—*Ibid.* p. 292. Authority.

YÁJNAVALKYA :—If one of *two or more parceners or* undivided kinsmen contract a debt for the sake of his family, Authority.

Annotations.

212. Where the consideration of a debt may have been such, as in its nature to charge the common fund, as for the nuptials of any of the family, the expense attending them must have been reasonable, according to the usage and means of the family; beyond which, if carried to excess, he, who so imprudently contracted it, will be alone liable, unless it have been adopted by the rest. Contracted fairly, for the use of the family, by whatsoever member of it, it binds the whole.—Stra. H. L. Vol. I, p. 167.

* *Vide* Precedents, pp. 408, 409.

† *Vide* Precedents, pp. 62—80, 149.

and either die or be very long absent abroad, the other parceners or joint tenants shall pay it.—*Ibid.*, p. 290.

Bombay Act No. VII of 1866.

I.—No son or grandson of a deceased Hindú shall, merely by reason of his being such son or grandson, be liable to be sued for any of the debts of such deceased Hindú.

II.—No son, grandson, or heir of a deceased Hindú, who has, by himself or his agent, received or taken possession of any property belonging to the deceased, shall be liable personally for any of the debts of the deceased, merely by reason of his having so received or taken possession of any such property: but the liability of such son, grandson, or heir in respect of such debts, shall be as the representative of such deceased Hindú, and shall be limited to paying the same out of, and to the extent of, the property of the deceased which such son, grandson, or heir or any other person by his order or to his use has received, or taken possession of, as aforesaid, and which remains unapplied: Provided that if any part of such property so received or taken possession of as aforesaid shall not have been duly applied by such son, grandson, or heir, he shall be liable personally for such debts to the extent of the property not duly applied by him.

IV.—No person who has married a Hindú widow shall, merely by reason of such marriage, be liable for any of the debts of any prior deceased husband of such widow.

V.—Where a debt is contracted after this Act shall come into operation by one or more members of an undivided Hindú family under such circumstances as that the same forms the debt of the undivided family, no member of such undivided family who is unborn or under the age of twenty-one years at the time of the contracting of such debts shall be liable personally to pay the same, but such member shall only be liable to pay the same out of and to the extent of the property of the undivided Hindú family, and of the separate property, if any, belonging to any deceased members of the undivided family who were above

the age of twenty-one years at the time of contracting the same, received, or taken possession of, by such member, or any other person by his order or to his use, and remaining unapplied, unless any part of such property so received or taken possession of as aforesaid shall not have been duly applied by such member, in which case he shall be further liable personally for such debt to the extent of the property not duly applied by him.

VI.—Except as provided in Section V of this Act, nothing in this Act contained shall be construed as limiting or affecting the liability of any person as surviving member or one of the surviving members of an undivided Hindú family for any debt contracted under such circumstances as that the surviving member or surviving members of such undivided family is or are by the law now in force liable to pay the same.

SECTION III.

ON MAINTENANCE.

According to the rules of the law of inheritance the nearest relatives of a deceased person inherit his estate, and according to the immemorial and prevalent custom, only one of the nearest relatives of the deceased takes his whole estate to the exclusion of the rest,* yet so anxiously careful has the law been that there shall exist no ultimate distress in the helpless members of his family, while means exist to prevent it, that is, it declares such persons to be entitled to maintenance out of his estate, since it was the bounden duty of the late proprietor to maintain them. Thus MANU :—" He who bestows gifts on strangers (with a view to wordly fame, while he suffers his family to live in distress, though he has power to support them, touches his lips with honey, but swallows poison : such virtue is counterfeit."—"Even what he does for the sake of the spiritual body, to the injury of those whom he is bound to maintain shall bring him ultimate misery both in this life and in the next." So also VRIHASPATI: "A man may give what

* See *ante*, page 223.

remains after food and raiment of his family, the giver of more (who leaves his family naked and unfed, may taste honey, but shall afterwards find it poison."* Thus every person while living is bound to support his family, and he having been so, the successor to his estate is also bound to support them; inasmuch as the heir who takes the deceased's estate does not take it solely for himself, but also for the performance of acts beneficial to him in the after-life. Now a very great benefit is done to the soul of the deceased by supporting his family, as he is doomed to hell if they suffer for want of the necessaries of life; so says MANU:—"The support of persons who should be maintained, is the approved means of attaining heaven. But hell is the man's portion if they suffer. Therefore, (let the master of a family) carefully maintain them."‡

Consequently,—

Vyavasthá. **214. The members of the deceased's family who were or were to be supported by him are also to be supported by the person inheriting his estate.**

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* MANU, Chap. XI, vs. 9, 10.

† *Vide* Coleb. Dig. Vol. II, p. 181.

‡ Maintenance by a man of his dependants is, with the Hindoos, a primary duty. They hold, that he must be just, before he is generous, his charity beginning at home; and that even *sacrifice* is mockery, if to the injury of those whom he is bound to maintain. Nor of his duty in this respect are his children the only objects, co-extensive as it is with his family, whatever be its composition, as consisting of other relations and connexions, including (it may be) illegitimate offspring. It extends to the outcaste, if not to the adulterous wife; not to mention such as are excluded from the inheritance, whether through their fault, or their misfortune; all being entitled to be maintained with food and raiment at least, under the severest sanctions. A benevolent injuction! existing at no time ever to the same extent under our own law; which professes little of the kind, since the time that it has been competent with us for a man to dispose by will of the whole of his property, real and personal, without regard to the natural claims of wife and issue, to say nothing of more distant ties; a latitude, not approved by (Blackstone) the author of the commentaries; who, in noticing the power of the parent so to disinherit his children, thought it had not been amiss, if he had been bound to leave them at least a necessary subsistence;—or, as the same sentiment has been expressed, in their peculiar manner, by the highest Hindu authorities, "Who leaves his family naked and unfed, may taste honey at first, but shall afterwards find it poison." The obligation extends, under particular circumstances, to responsibility for each other's debts, in a degree unknown to our law, as will be subsequently seen.—Stra. H. L. Vol. I, (2nd Ed.) pp 67, 68.

Because their maintenance is an indispensable obligation. VIJNÁNESHARA, *Mit. Sans.*, p. 259. Authority.

Because maintenance of the family is an indispensable obligation.—MITRA MISRA, *Vir. Mit. Sans.* p. 181. Authority.

NÁRADA.—A man is indispensably bound to support his family.—Coleb. Dig. Vol. I, p. 301. Authority.

The declarations, as above, of MANU, NÁRADA, VIJNÁNESHWARA and other authorities have, however, been considered to be applicable not to the family in general, but to those members thereof whom the late owner was bound to support even by the commission of improper acts. Almost all of such members have been specified in the following text of MANU:—

"MANU declared that a mother and father, in their old age, a virtuous wife, and infant son must be maintained even by the commission of a hundred offences."* Authority.

Therefore,—

215. The person inheriting the property of a deceased owner is legally bound to maintain his old mother and father (*a*), virtuous wife, infant son, daughter and sister (*b*).* *Vyavasthá.*

(*a.*) As the term "son"* signifies the grandson and great-grandson as well as the son†, it is to be understood that the terms "mother and father" comprehend also the 'sonless grandmother and grandfather and also the great-grandmother and great-grandfather whose son and grandson are dead; that, in like manner the term "infant son" comprehends also the fatherless grandson and daughter, and the great-grandson and daughter whose father and grandfather are dead.

(*b.*) Infant sister] It having been determined that the unmarried sister must be initiated (in marriage), *á fortiori* it has been implied that she must be maintained until her marriage;

* See Partition and Precedents pp. 589, 596—602, 638, 610, and *Vyavasthá Darpana* (2nd Ed.) pp. 375, 376.

† See *ante*, pages 18, 19 and Precedents, pp. 58, 219, 477. *Ante*, p. 233.

and the text - " Their daughters too must be maintained until provided with husbands"* is applicable to this case also, according to the maxim—"the sense of the law, as ascertained in one instance is applicable in others also, provided there be no impediment.†

Vyavasthá. **216.** A step-mother has a legal claim to be maintained out of the estate left by her deceased husband, or by her step-son inheriting his estate.‡

The general doctrine respecting the right of a widowed daughter-in-law to maintenance is, that—

Vyavasthá. **217.** If she inherited or received so much property from her late husband or any other person as to be sufficient for her support, her father-in-law is not, in that case, bound to maintain her; but if she received no such property, then the father-in-law is bound to maintain her, if she was engrafted in his family by him or by his permission: in other cases, he is morally bound to support her.§

Vyavasthá. **218.** The head of a family having been *morally* bound to support his relatives other than those above mentioned, his successor also is morally bound to maintain them.

Vyavasthá. **219.** The relatives who on account of defects, or by the force of custom, are excluded from inheritance, are legally entitled to be maintained out of the late proprietor's estate, which, but for the prevalent custom or their own defects, they would have inherited together with the inheritor.‖

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* See post, page 260.

† *Vide* Coleb. Dá. Bhá. p. 63. Note 31.

‡ *Vide* Precedents, pp. 589, 610, 611.

§ *Vide* Precedents, pp. 599, 605, 608, 609 and *Vyavasthá Darpana* (2nd Ed.) pp. 373, 376, 390.

‖ *Vide* Precedents. pp. 446, 606, 607, &c.

Persons excluded from inheritance for a defect or defects are—"an impotent person, an outcaste, his issue, a person born blind or deaf, one lame, a mad man, an idiot, one dumb, one who has lost the use of a limb or limbs, a leper with ulcers, one afflicted with an incurable disease unexpiated for, an enemy to his father, a hypocrite or a person wearing the token of religious mendacity, one who has assumed another order, and the rest." See the Chapter on Exclusion from Inheritance.

Premising impotent persons and the rest, says—

MANU :—But it is just that the heir who knows his duty should give to all of them food and raiment for life, without stint, according to the best of his power: he who gives them nothing, shall sink assuredly to a region of punishment (c). Authority.

(c). From the conclusion of the dictum—"shall sink assuredly to a region of punishment"—it must be inferred that he who does not willingly give (food and raiment) shall be compelled to give them.—*Vide* Coleb. Dig. Vol. III page 320. V. D. 1013.

DEVALA :—They ought to be maintained excepting, however, the outcaste and his son.* Authority.

BOUDHÁYANA :—Persons incapable of transacting business, blind, idiots, those who are immersed in vice, or afflicted with incurable diseases, and even those who neglect their duties, but not the degraded nor their issue, let the heir supply with food and raiment.* Authority.

YÁJNAVALKYA :—An outcaste and his issue, an impotent person, one lame, a mad man, an idiot, a blind man, a person inflicted with an incurable disease, must be maintained excluding them, however, from participation.—*Mit.* In. Chap. II, Sect. X, § 1. Authority.

These, the impotent man, and the rest, are excluded from participation. They do not share the estate. They must be supported by an allowance of food and raiment only, and the penalty of degradation is incurred if they be not maintained.—*Mit.* In. Chap. II, Sect. x, § 5. Authority.

* *Vide* Coleb. Dig. Vol. III, pp. 305, 316.

Vyavasthá. **220. The wives of the impotent persons and the rest, if chaste, must be maintained for life; their daughters too, must be supported so long as they are not disposed of in marriage.**

Authority. YÁJNAVALKYA :—Their daughters must be maintained likewise, until they are provided with husbands (*d*). Their childless wives, conducting themselves aright, must be supported ; but such as are unchaste should be expelled, and so indeed should those, who are perverse [*prati-kúla* (*e*)]* *Mit.* In. Chap. II, Sect. x, § 12, 14.

(*d*). Their daughters or the female children of such persons, must be supported until they be disposed of in marriage. Under the suggestion of the word "likewise," the expenses of their nuptials must be also defrayed.—*Ibid.* § 13.

(*e*). The wives of these persons (*i. e.*, the impotent person and the rest), being destitute of male issue, and being correct in their conduct, or behaving virtuously, must be supported or maintained. But if unchaste, they must be expelled ; and so may those who are perverse (*prati-kúlá**). These last may indeed be expelled ; but they must be supported, provided they be not unchaste. For a maintenance must not be refused solely on account of perverseness.—*Ibid.*, § 15.

The term "Virtuous (*Sádhwí*)" being used in the foregoing text of MANU,"† it is implied that—

Vyavasthá. **221. An adulterous wife is not entitled to maintenance.‡**

Again, the term 'wife' being indicative of 'woman' in general,§—

* In his Digest (Vol. iii, p. 324), Mr. Colebrooke has rendered the word "*prati-kúlá*," by 'traitorous.'

† See *ante*, page 257.

‡ *Vide* Precedents, pp. 589, 604, 605 and *Vyavasthá Darpana* pp. 375, 390.

§ See *ante*, pp. 157,—169, and Precedents, pp. 417, 424, 427, 433, 435,605.

222. The mother and the rest also, if unchaste, are not entitled to maintenance.* Authority.

223. If the wife or any such member of the family as must be supported, be expelled or forsaken without a good reason, then they must have maintenance from the head of the family during his life, and out of his assets after his death.† *Vyavasthá.*

224. Separate maintenance is to be allowed to that member of the family who for a just cause could not live in, and mess with, the family.‡ *Vyavasthá.*

225. Should a woman without unchaste purposes quit the family house, and live with her parents or other relations, she cannot thereby forfeit her right to maintenance.‡ *Vyavasthá.*

226. The widow, however, is not entitled to maintenance by residing elsewhere without a just cause, if she was directed by her husband to be maintained in the family house.§ *Vyavasthá.*

227. The son begotten by a *Bràhmana, Kshatriya* or *Voishya* on a female slave or kept mistress, is entitled to a suitable maintenance out of his father's estate, and not to inherit it.|| *Vyavasthá.*

228. The amount of maintenance should be fixed in consideration of the receiver's rank and position in life, as well as to the extent of the estate.¶ *Vyavasthá.*

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* See *ante*, pp. 157, 158, 159 and Precedents, pp. 417, 424, 427, 433, 435, 447, 605.

† *Vide* Precedents, pp. 589, 600, 608, & V. D. p. 374.

‡ *Vide* Precedents, pp. 589, 599, 600, 604,—*Vide* V. D. pp. 381—384.

§ *Vide* Precedents, pp. 589, and V. D. p. 389.

|| *Vide* Precedents, pp. 606, 611.

¶ *Vide* Precedents, pp. 589, 602—604 and V. D. pp. 381—384.

Vyavasthá. **229.** If means allow, not only food and raiment should be supplied, but also a sum for the performance of religious acts and ceremonies, and the amount for this purpose should be fixed according to the above rule.*

Vyavasthá. **230.** If, however, there exist in a family a long established and prevalent custom with respect to allowing or not allowing maintenance to a particular relative, such custom is to be acted upon in preference to any rule whatever of the law. See the Chapter on Custom or Usage.

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* *Vide* Precedents, p. 589.

END OF VOL. I.

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PART II.

PRECEDENTS,

Being decided Cases of the Privy Council, late Supreme and Sudder Courts, and the Present High Courts, Admitted Legal Opinions, and Responsa Prudentum.

IN TWO BOOKS.

BOOK I.

PRECEDENTS OF OWNERSHIP, RIGHT, HERITAGE, &c.

CHAPTER I.

OF OWNERSHIP, RIGHT, HERITAGE, &c.

SECTION II.*

RELATIVE TO HERITAGE.

CALCUTTA, H. C. A.—*The 3rd of January*, 1868.

Present:

The Hon'ble G. Loch and Dwarka Nauth Mitter, *Judges*.

Case NO. 98 of 1867.

SHEO-DYAL TEWAREE (one of the Defendants,) Appellant,

versus

JUDOO-NAUTH TEWAREE (Plaintiff,) and others, (Defendants,) Respondents.

Case NO. 99 of 1867.

SHEO-DYAL TEWAREE CHOWDHRY (Plaintiff,) Appellant,

versus

BISHO-NAUTH TEWAREE CHOWDHRY (Defendant,) Respondent.

Case NO. 104 of 1867.

SHEO-DYAL TEWAREE (Plaintiff,) Appellant,

versus

BISHO-NAUTH TEWAREE (Defendant,) Respondent.

* Section II is commenced with, because there are no precedents of the first Section of the text book.

Case No. 111 of 1867.

JODOO-NAUTH TEWAREE (Plaintiff,) Appellant,

versus

BISHO-NAUTH TEWAREE and others,

(Defendants,) Respondents.

According to the Mitakshara, the mother, or the grandmother, is entitled to a share when sons, or grandsons, divide the family estate between themselves ; but she can not be recognized as the owner of such share until the division is actually made ; she has no pre-existing right in the estate except a right of maintenance.

Under the Hindoo Law, two things at least are necessary to constitute partition : the shares must be defined, and there must be distinct and independent enjoyment. Whatever is acquired at the charge of the patrimony is subject to partition ; but if the common stock is improved, an equal share is ordained. Where a co-parcener, with comparatively small detriment to the joint estate, acquires any separate property by his own labour or capital, the property is nevertheless to be considered joint although the acquirer gets a double share.

Mitter, J.—These appeals have arisen out of three original suits instituted in the court of the Principal Sudder Ameen of Mymensing. The facts disclosed by the pleadings in these three suits have been set forth at length in the judgments recorded by that officer, and we think it, therefore, unnecessary to recapitulate them in this place. The real contest between the parties is about the division of a joint undivided estate, and the principal questions to be determined are the extent of that estate, and the shares in which, and the persons between whom, the division is to be effected. At the request of the parties, all the cases have been heard together, both here and in the Court below, and the evidence produced in each had been fully used for the purpose of all by their consent. For the sake of convenience, however, we think it necessary to deal with these appeals separately in our judgement.

In appeal No. 111 of 1867, certain points have been raised before us on behalf of the appellant Jodoo-nath Tewaree :—

As to the fourth ground, we are of opinion that the contention of the appellant is correct. Mussummat Golaba was the mother of Sheo-dyal and grandmother of the appellant. Bisho-nauth is the first cousin or paternal uncle's son of Sheo-dyal. She, Mussummat Golaba, has died subsequent to the decree of the lower court, and Mussummat Doolaro, wife of Sheo-dyal, as an alleged devisee under her, has been permitted by us to defend this appeal. Now it is quite clear, that the share which ought to have been allowed to

Golaba, has merged in the general estate, conceding, for the sake of argument, that she was entitled to any share under the Hindoo law as it is administered in the Benares School. The text of the *Mitákshará* that has been referred to merely says: "of heirs, dividing after the death of the father, let the mother also take a share," or in other words, the mother or grandmother, as the case might be, is entitled to a share, when sons or grandsons divide the family estate between themselves. But the mother or the grandmother can never be recognized as the owner of such a share, until the division has been actually made. She has no pre-existing vested right in the estate except a right of maintenance. She may acquire property by partition, for, partition is one of the recognized modes of acquiring property under the Hindoo law. But partition, in her case, is the sole cause of her right to the property. It follows, therefore, that the effect cannot precede the cause.

There can be no doubt that under the Hindoo law, two things, at least, are necessary to constitute partition. The shares must be defined, and there must be distinct and independent enjoyment of those shares. In the case before us, neither of those things has yet taken place. The definition of the shares by the Principal Sudder Ameen is no more final than our judgment at the present day, and it is the question of shares that we are still determining. As to distinct and independent enjoyment, no such thing has yet occurred. The appellant has been merely seeking for a partition. Suppose that the Appellant were to withdraw this appeal at this very moment and to agree to live jointly with his uncle Sheo-dyal in estate as before, could Golaba, if she were alive, have still asked for the share alloted to her by the Principal Sudder Ameen? Or suppose that Golaba, instead of appearing as an intervener in the Lower Court, as she did, under Section 73 of the Procedure Code, had brought an action against them both for the arrears of her maintenance, which would have accrued subsequent to the decree of the Lower Court down to the present day,—what answer could they have given to such a claim? Surely they could not have pleaded, she was not entitled to be maintained out of the estate, because they were going to make over to her a share of it. Such a plea would be absurd on the very face of it. She is not to starve until the assignment is actually made.

It has been said, that the question of maintenance is quite distinct from the question before us; but there can be no doubt that the share that is given to a Hindoo mother, at the time of partition, is given to her for no other purpose than as a provision for her maintenance. She has no right to ask for maintenance after she has got such a share, and if a partition has been effected in this case Golaba's suit for maintenance must have been dismissed on that ground alone. It is unnecessary, therefore, to decide whether Golaba had a right to alienate the share assigned to her by the Principal Sudder Ameen as her stree-dhun under the Mitákshará Law. Our finding is, that she had acquired no right to that share, as she died before partition has been actually made. We, therefore, direct, that the family estate, real and personal, such as it may be found to be, shall be divided between the three original parties to this suit, namely, Sheo-dyal, Bisho-nauth and the Appellant Judoo-nauth, in the following proportions:—

Sheo-dyal, 5 annas.
Bisho-nauth, 7 annas.
Judoo-nauth, 4 annas.

We now come to Sheo-dyal's appeal No. 98 of 1867.

With reference to the first point, (which is, that Sheo-dyal having been the acquirer of those properties which still stand in his name, is entitled to a double share under the Hindoo law,) we are of opinion that it is not at all sound. This case is not a case in which a double share can be awarded. It has been said, that Sheo-dyal contributed both money and labour in acquiring these properties, though joint funds have also been used. There is no pretension to say now, whatever might have been pleaded in the Court below, that there is no joint property at all; so that the admission regarding the use of joint funds is perfectly correct. So far as the evidence is concerned, we have neither any proof of the amount of the money supplied nor the purposes for which it was used; and as to the labour, that consisted in purchasing estates out of the funds of a joint ancestral firm, which Sheo-dyal was managing for the benefit of the joint family.

But even conceding all these facts to the appellant, we do not see how he can succeed in his contention. The very authorities relied upon by him are strongly and expressly against him; verse 29,

Chapter I. Section 4 of Mr. Colebrooke's Mitákshará, page 275, says: "It is settled that whatever is acquired at the charge of the patrimony is subject to partition." But verse 30 qualifies this proposition by propounding an exception, and verse 31 explains that exception. Verse 30 says: "The Author propounds an exception to this rule: 'But if the common stock be improved, an equal share is ordained.'" And verse 31 says: "Among unseparated brethren if the common stock is improved and augmented, through agriculture, commerce or similar means, an equal division nevertheless takes place, and a double share is not allotted to the acquirer." This is no more than a case of augmentation at the highest. The ancestral firm was the main nucleus of this estate, and every property acquired from such a nucleus falls within the rule of equal division. Verse 29 applies to a different state of things. Where a co-parcener with comparatively small detriment to the joint estate, acquires any separate property by his own labour or capital, the property is nevertheless to be considered as joint, although the acquirer gets a double share. Here, strictly speaking, there is no proof of Sheo-dyal having supplied any portion of the money required for the purchase of the properties in question from his own funds, and, as to labour, his case does not stand higher than that of a manager of a joint undivided family. In our opinion, it is not even a case of *augmentation*. The mere conversion of joint funds into land is not an acquisition within the meaning of the Hindoo law. The labour of a manager is not a means for acquiring seperate property. It was labour voluntarily undergone for the benefit of the joint family. We hold, therefore, that the case before us neither falls within the rule laid down in verse 29, nor within the exception in verse 30, and must, therefore, be treated as an ordinary case of joint property.—S. W. R. Vol. IX, p. 61.

SECTION III.
RELATIVE TO HERITABLE RIGHT.

CALCUTTA, H. C. A.—*The 7th of June*, 1867.

Present:

The Honorable Sir Barnes Peacock, *Kt., Chief Justice*, and the Honorable C. B. Trevor, G. Loch, L. S. Jackson, and A. G. Macpherson, *Judges*.

Cases Nos. 228, 240, 241, 249, 252, and 255 of 1865.

RAJA RAM TEWARY and others (Defendants,) Appellants,

versus

LUCHMUN PERSAUD and another (Plaintiffs,) Respondents.

According to the Mitákshará Law, a son acquires by birth a right in ancestral property and has a right during his father's life-time to compel a partition of such property. The father cannot, without the consent of the son, alienate such property except for a sufficient cause; and the son may not only prohibit the father from so doing, but may sue to set aside the alienation, if made. The cause of action to the son accrues when possession is taken by the purchaser. A new cause of action does not accrue upon the subsequent birth of a younger brother, either to the elder brother alone, or to him and his brother jointly,

Courts should reject plaints against Defendants for causes of action which have accrued against each of them separately, and in respect of which they are not jointly concerned.

These appeals were referred to a Full Bench by Peacock *C. J.* and L. S. Jackson, *J.*

The judgment of the Full Bench was delivered as follows by Peacock, *C. J.*—This is a suit brought by Luchmun Persaud, the son of Jeetun Lall, on account of himself, and as guardian of his minor brother Radha-mohun Persaud. The appeal is from a decision of the Principal Sudder Ameen of Sarun. The suit was brought on the 5th of October 1863, and is to recover possession of certain lands by reversal of certain deeds, some of those deeds being deeds of absolute sale, and some of conditional sale.

I now proceed with the case with reference to the defendant in appeal No. 241, which is a separate appeal, although the case is mixed up with others and forms part of only one action in the Court below.

The suit against this defendant is to set aside an absolute deed of sale of ancestral immoveable property executed by the plaintiff's father Jeetun Lall in 1848. Possession was taken by the purchaser at that date, so that more than 12 years from the date of the deed and the taking of possession under it had expired when the suit was commenced on the 5th of October 1863. Luchmun Persaud was born about 1837, and consequently more than three years had expired since he came of full age.

The question turns upon the Mitákshará Law, that being the Law of the district in which the lands are situate.

We are of opinion that Luchmun Persaud's cause of action accrued at the time when possession was taken under the deed of sale, notwithstanding the father of Luchmun Persaud was then living.

It appears clear that, according to the Mitákshará Law of inheritance, a son acquires a right in ancestral property during the life of his father. (See Chapter I, Section 1.) "The term heritage signifies that wealth which becomes the property of another solely by reason of relation to the owner." (Para. 2.)

"It is of two sorts :—un-obstructed *(a-prati-bandha,)* or liable to obstruction *(sa-prati-bandha.)* The wealth of the father or of the paternal grandfather becomes the property of his sons or of his grandsons in right of their being his sons or grandsons; and that is an inheritance not liable to obstruction. But property devolves on parents (or uncles,) brothers, and the rest, upon the demise of the owner if there be no male issue; and that the actual existence of a son and the survival of the owner are impediments to the succession; and, on their ceasing, the property devolves on the successor in right of his being uncle or brother. This is an inheritance subject to obstruction: the same holds good in respect of their sons and their descendants." (Para. 3.)

The property in this case was ancestral, and not the self-acquired property of Jeetun Lall. The plaintiff upon his birth, therefore, as the son of Jeetun Lall, acquired a right in the property, even during his father's life-time, for, the case was one of un-obstructed heritage.

The Author of the Mitákshará goes on to speak of partition, and shows that rights acquired by unobstructed heritage exist before partition.

He says:—

In para. 4:—"Partition is the adjustment of divers rights regarding the whole by distributing them on particular portions of the aggregate."

In Para. 5:—"Entertaining the same opinion Nárada says: 'where a division of the paternal estate is instituted by sons, that becomes a topic of litigation called by the wise partition of heritage.'"

In para. 7:—He discusses the question, whether property arises from partition, or whether the partition is of pre-existent property. He says: "Does property arise from partition; or does partition of pre-existent property take place? Under this head of discussion, proprietary right is itself necessarily explained; and the question is, whether property is deduced from the sacred institutions alone, or from other (and temporal) proof."

The Author then examines the arguments as to whether property is temporal or not. In the course of the discussion, he states that "an owner is by inheritance, and that unobstructed heritage is here denominated 'Inheritance'" (paras. 12 and 13); and after discussing the arguments on both sides, he comes to the conclusion that property is temporal. He explains in para. 16 the object of the disquisition, and he proceeds in para. 17:—

"Next, it is doubted, whether property arise from partition, or the division be of an existent right."

In paras. 18 to 22, he states the arguments urged by his adversaries against his position that property exists before partition, and in paras. 23 to 26 he answers those objections, and then in para. 27 he comes to the conclusion that property in the paternal or ancestral estate is acquired by birth, although the father, during the minority of his sons, has power to dispose of it for indispensable acts of duty, and for other purposes prescribed by law. He says:—"Therefore, it is a settled point that property in the paternal or ancestral estate is by birth, although the father have independent power in the disposal of effects other than immovables for indispensable acts of duty and for purposes prescribed by texts of law, as gifts through affection, support of the family, relief from distress, and so forth; but he is subject to the control of his sons, and the rest, in regard to the immovable estate, whether acquired by himself or inherited from his father or other predecessor, since it is ordained, 'though immovables

He says:—"The distribution of the paternal estate amongst sons has been shown. The Author next propounds a special rule concerning the division of the grandfather's effects by grandsons:—'Among grandsons by different fathers, the allotment of shares is according to the fathers.'"

"Although grandsons have by birth a right in the grandfather's estate, equally with sons, still the distribution of the grandfather's property must be adjusted through their fathers, and not with reference to themselves: the meaning here expressed is this: 'If unseparated brothers die leaving male issue, and the number of sons be unequal, one having two sons, and another three, and a third four, the two receive a single share in right of their father, the other three take one share appertaining to their father, and the remaining four similarly obtain one share due to their father. So if some of the sons be living and some have died leaving male issue, the same method should be observed: the surviving sons take their own allotments, and the sons of their deceased brothers receive the shares of their own fathers respectively. Such is the adjustment prescribed by the text." (See para. 2.)

If the father be alive and separate from the grandfather, or if he have no brothers, a partition of the grandfather's estate with the grandson would not take place; since it has been directed that shares shall be allotted in right of the father; if he be deceased or admitting partition to take place, it would be made according to the pleasure of the father, like a distribution of his own acquisitions. To obviate this doubt, the Author says: "For, the ownership of father and son is the same in land which was acquired by the grandfather, or in a corrody, or in chattels, (which belonged to him.)"

The Author then proceeds to point out a distinction between ancestral estate and that which was self-acquired by the father. He says:—

"In such property which was acquired by the paternal grandfather through acceptance of gifts, or by conquest, or other means as commerce, agriculture, or service, the ownership of father and son is notorious, and therefore partition does take place. For, or because, the right is equal or alike, therefore, partition is not restricted to be made by the father's choice, nor has he a double share." Para. 5.

In para. 6 he goes on :—"Thence also it is ordained by the eceding text that the allotment of shares shall be according to the thers, although the right be equal."

In para. 7 he says :—"The first text 'when the father makes a rtition' &c. (Section 2, para. 1) relates to property acquired by e father himself. So does that which ordains a double share. t the father, making a partition, reserve two shares for himself. ne dependence of sons, as affirmed in the following passage, 'while th parents live, the control remains even though they have rived at old age'—must relate to effects acquired by the father mother. This other passage—'they have not power over it, (the ternal estate) while their parents live'—must also be referred to e same subject."

In para. 8 he says :—"Thus, while the mother is capable of aring more sons, and the father retains his wordly affections and es not desire partition, a distribution of the grandfather's estate es nevertheless take place by the will of the son, that is, the son the father or the grandson."

Sir William Macnaghten in his principles of Hindoo Law says at, 'when the mother is incapable of bearing more sons, distribuon of the grandfather's estate takes place by the will of the son.' rom which it was contended that it is to be inferred that, in his pinion, it would not take place, whilst the mother was capable of earing children.* But Macnaghten does not refer to para. 8, but ly to a former para. which relates to self-acquired property.

In para. 9, the Commentator of the Mitákshará goes on to say : So likewise the grandson has a right of prohibition, if his unsepated father is making a donation, or a sale of effects inherited m the grandfather, but he has no right of interference if the ects were acquired by the father. On the contrary, he must quiesce, because he is dependent."†

The words 'the grandson has a right of prohibition' do not ean merely that the son can prevent his father from making a ft or sale of the property by injunction, if he has power to proibit, he must have a right in the property and a right to set aside he sale, if made.

* Vide, *Mitákshará*, Chap. I, Sect. ii, para. 8.

† This should be read in connection with paras. 18 to 22 at page 8. See also Part I, f this Volume.

In para. 10 the Author proceeds:—

"Consequently, the difference is this:—'Although he (that is, the son,) have a right by birth, in his father's and his grandfather's property, still, since he is dependent on his father in regard to the paternal estate, and since the father has a predominant interest, as it was acquired by himself, the son must acquiesce in the father's disposal of his own acquired property; but since both have indiscriminately a right in the grandfather's estate, the son has a power of interdiction, if the father be dissipating the property.'"

Here, then, is a clear expression of the grandson's right to prevent his father from alienating ancestral property.

Para. 11 was cited to show that the father was not bound to divide ancestral estate; but it does not establish that point. In that paragraph the Commentator refers to Menu as an authority that the father, however reluctant, must divide the grandfather's property; and he points out a distinction as regards ancestral wealth recovered by the father, which is put upon the same footing as self-acquired property, and he holds that Menu, by the declaration, shows that the father was bound to divide other ancestral property.

It is clear, then, that a son by birth alone acquires a right in ancestral property, and that he has a right during his father's lifetime to compel a partition of such property; that the father cannot, without the consent of the son, alienate such property except for sufficient cause; and that the son may prohibit the father so doing. It has been held that the son has not merely the right to prohibit, but that he may sue to set aside the alienation, if made.

In the Sudder Decision for 1853, page 343, it was held that the sale of joint undivided property in a Mithilá family without necessity was void, unless made with the consent of all the joint sharers, and that it was not valid even for the seller's own share: and it was stated by the Judges to have been repeatedly so held.

In Stokes's Reports, Vol. I, page 277, it was held that a member of an undivided Hindoo family may alienate the share to which, if a partition took place, he would be individually entitled."

It is not necessary for us to determine which of the two doctrines is correct. All that we have to do is to determine when the cause of action accrued.

If the sale was valid as to the father's share, it must have operated as a severance of the joint interest in the property included in the conveyance. If so, Luchmun, the only son living, might have sued the purchaser for a partition of the property, or to recover his own share of it. The father's death in that case would not alter his rights.

If the sale was invalid as regards the father's share, the son might have sued in the father's life-time for a partition or to recover the whole estate to be held as joint family estate.

So in a case under the Mitákshará Law, if a father and a son of full age should be dispossessed in the father's life-time of ancestral property, the son could not, upon the father's death, 20 years afterwards, sue to recover the estate upon the ground that limitation did not begin to run in the father's life-time.

The next question to be decided is, did a new cause of action accrue upon the birth of Radha-mohun, the younger brother, either to him alone or to him and his brother jointly?

Luchmun Persaud was born in 1837. Radha-mohun was not born until the end of 1856 or the beginning of 1857, only about 9 years after the sale in 1848, and not 12 years before the commencement of the suit. It seems clear that, no new cause of action accrued upon his birth.

It is clear that, before his birth his father and his brother might have made a partition of the estate, and if they had done so, he would have had no interest in the share allotted to his brother, (Mitákshará, Chap. I, Sec. 6); and before his birth, his father might have sold the share allotted to him, so, the father and his elder brother, or the father with the assent of the elder brother, might, before his birth, have sold the estate, and the sale would have been binding upon him. It is contended that, although Radha-mohun would have been bound by a sale made by the father jointly with Luchmun Persaud, still he is not bound by a sale by the father alone without the consent of Luchmun.

If the father and Luchmun had been turned out of possession by a wrong-doer, the cause of action would have accrued at the time of the dispossession, and a new cause of action would not have accrued upon the birth of Radha-mohun. Radha-mohun succeeded to the estate as it was when he was born. He had no right to dis-

sent from the sale for he was not born at the time. The sale might have been invalid as against Luchmun, but the cause of action accrued to Luchmun immediately the purchaser took possession. If Radha-mohun had been born at the time when the estate was sold, the father would have been entitled to only $\frac{1}{3}$ of the estate upon partition; but as it was, the father and Luchmun would each have been entitled to $\frac{1}{2}$ if partition had been made at the time. If the case in Stokes's Reports is correct, the father might have lawfully sold $\frac{1}{2}$ at that time; but if Radha-mohun on his birth acquired a new right against the purchaser, it was a right which, if partition had been made at that time, would have entitled him to $\frac{1}{3}$. Now, if Luchmun had sued and recovered $\frac{1}{2}$ before Radha-mohun was born, could Radha-mohun upon his birth have sued for $\frac{1}{2}$? If so, the purchaser, instead of acquiring $\frac{1}{2}$, would in fact be able to retain only $\frac{1}{2}$ *minus* $\frac{1}{3}$ of the property conveyed, or in other words $\frac{1}{6}$ instead of $\frac{1}{2}$.

Whatever interest in the property Radha-mohun became entitled to on his birth, he derived it by unobstructed heritage or inheritance from his father. He could not inherit any thing which his father had lawfully conveyed away. If the father parted with his own share, he could not inherit any part of it. If the conveyance caused a severance of the joint interest of him and Luchmun and passed his own half to the purchaser, Radha-mohun, as heir of the father, could not inherit any part of the share which passed to the purchaser, neither could he inherit from his father any part of Luchmun's share. At most, he inherited only a cause of action; and it is difficult to see how he could even inherit that from his father unless his father had a right to set aside his own sale. Even if he took by inheritance from his father an interest in Luchmun's right of action against the purchaser, he must have inherited *it* subject to the operation of the statute of limitation upon it. *At* all events, Radha-mohun's birth could not create a fresh interest or a new right of action in Luchmun, either alone or jointly with himself.

Luchmun is now suing upon a joint cause of action. Luchmun's interest in it is clearly barred by limitation. If there is any cause of action which is not barred, it must be a separate cause of action in Radha-mohun. I do not think that a separate cause of action in Radha-mohun was caused by his birth; but it is not ne-

cessary to determine that question, as the cause of action now sued upon is a joint cause of action in Luchmun and Radha-mohun. Limitation is pleaded to a joint cause of action. If that issue is found against Luchmun, I should think he could not as guardian of Radha-mohun, be allowed, under the allegations in this suit, to recover upon a separate cause of action, if any, accrued to Radha-mohun on his birth. That would be a wholly different cause of action from that sued upon. It is clear that Radha-mohun did not upon his birth inherit from his father a joint cause of action with Luchmun, and that Luchmun's cause of action did not accrue upon the birth of Radha-mohun.

We are of opinion, that the cause of action, if any, accrued when possession of the land was taken by the purchaser.

It having been decided that in the cases, out of which appeals Nos. 228 and 252 arise, the Statute of Limitation did not apply, the appeals will go back to the Division Bench which referred them to this Court to determine the appeals so far as the other issues are concerned.—S. W. R. Vol. VIII, pp. 15—22.

According to the Mitákshará law, a son acquires by birth a right in ancestral property. *Badamu Kunwur* and others v. *Wazeer Singh*.—S. W. R. Vol. V, p. 78.

According to the Mitákshará law, a son has an equal right with his father in ancestral property. *Birkishor Sahai Singh* and others v. *Har Ballab Narayin Singh* and others.—S. W. R. Vol. V, page 502.

According to Hindu Law, sons acquire rights only in the property which belonged to their father *at the time of their birth*, and have no claim to property of which a *boná fide* disposition, effectual as against their father, had been made *long before they were born*.

The right of an after-born son to share as a coparcener divided property depends upon his mother being pregnant with him at the time of a partition.—*Yekeyamiam* v. *Agni-swarian* and another. Mad. H. C. R. Vol. IV, p. 307.

Proprietory right is created by birth, and not by conception. A child in the womb takes no estate. In cases where, when the suc-

cession opens out, a female of the family has conceived, the inheritance remains in abeyance until the result of the conception is ascertained. If the child be still-born, the estate goes not to *his* heir, but to the heir of the last owner.

A son's or grandson's right of prohibition to his useparated father making a gift, donation, or sale of effects inherited from his grandfather, cannot be exercised in favour of an unborn son. ***Mussammat Goura Chowdhurain*** v. ***Chamman Chowdhury.***—S. W. R. for 1864, page 340.

An inheritance cannot remain in abeyance for an unbegotten heir (such not being a posthumos son.) The succession must vest in the heirs existing at the time of the death of the person whose inheritance descends. *Koylas-nath Doss* v. *Gyamonee Dossee.*—S. W. R. for 1864, p. 314.

Durga Kanwari one of the wives of Tekait Fatteh Narayan Singh was pregnant at the time of her husband's death, and gave birth to a son Durga Narayan. On the death of Durga Narayan, who of course on his birth succeeded to the property in the entire mehal Chakaye as heir to his father, the plaintiff, as his mother and heiress, became entitled to the entirety of the mehal.—*Tekait Durga Prasaud Singh* and others v. *Mussammat Durga Kunwari.* S. W. R. Vol. XIII, p. 10.

CALCUTTA, H. C. A.—*The 15th of May,* 1865.

Present:

The Honorable G. Loch and W. S. Seton-Karr, *Judges.*

Case No. 386 of 1864.

MOHA-RAJAH JUGGUR-NAUTH SAHAIE and others, (Plaintiffs,) Appellants,

versus

MUSST. MUKHUN KOONWUR and others, (Defendants,) Respondents.

Under the Hindoo Law an adopted son has all the rights of a son born. When, however, an adopted son rests his title to succeed to a property on a confirmatory sunnud he is bound to prove the *sunnud.*

This was a suit on the part of Rajah Juggur-nauth Sahaie to resume a *Jagheer* held by Agnee Deb Narain, the adopted son of Beharee-laul, the former *Jagheer-dar*. The suit was before this Court in 1863; and on the 10th July of that year it was remanded to enable the lower Court to come to a distinct finding on the following points:—1st, Whether the plaintiff can resume a Jagheer on the death of the Jagheerdar without direct heirs, and bar the right of an adopted son to succeed? 2nd, Was the defendant adopted by Beharee-laul, and then duly recognized as grantee by the Moha-rajah; and was a confirmatory *sunnud* granted to him? The lower Court found from a decision of the Agent to the Governor-General dated 12th of Pous 1234, (and which, in the absence of any decision or evidence to the contrary, we must accept as laying down correctly what is the local custom of the province under his authority in these matters,) that the plaintiff was at liberty to resume grants made by himself or his ancestors upon the failure of heirs direct of the original Jagheer-dar. The Judge found, therefore, that adoption was no bar to resumption; but he held that resumption was barred in his case by a confirmatory sunnud granted by the Rajah in favor of the defendant on the 16th of Assin 1863 Sumbut, and he dismissed the suit.

The plaintiff has appealed, repudiating the sunnud as a forgery. On the other hand, we are asked to express an opinion whether an adopted son has not all the rights of a son born. We think that, under the Hindoo law, the adopted son has the same right as the son born, and if this Jagheer were, strictly speaking, hereditary, the adopted son, unless prevented by local or other custom, might succeed without any confirmation from the Rajah. But in the present case, the defendant has rested his right upon a confirmatory sunnud from the Rajah. This sunnud has not been proved. No witnesses have attested it, and it is evidently not executed in the usual formal and official manner that other deeds of a similar character are. We, therefore, reject the sunnud.

It is then urged that an adopted son is entitled to succeed, sunnud or no sunnud; and that the plaintiff has given no proof that he had authority to resume. The defendant, however, in this case rested his claim on the confirmatory [illegible] failed to establish. And the fact, even if true, that the Rajah has

received rent from defendant, will not deprive the Rajah of the right to resume, a right declared by the Governor-General's Agent to exist in him. Under this view of the case, we reverse the order of the lower Court, and decree the appeal with costs.—W. R. Vol. III, p. 24.

An adoption is tantamount to the birth of a son to the adopter, and the property inherited from the adopter must be regarded as ancestral: during the life-time of his father, a son cannot claim to have a specific share declared and defined; but is only entitled to a decree declaring the property to be ancestral. *Heera Singh* v. *Burzar Singh.* Agra, H. C. R. Vol. I, p. 256.

Property vests in an adopted son *immediately* on his adoption, though he be a minor.—*Srimati Denomoyee Dasi* v. *Durga Prosad Mitra.*—S. W. R. Vol. III, Mis. p. 6.

A son under the Mitákshará law is entitled jointly with his father from the moment of his birth, or, in the case of his adoption, to ancestral estate, and also to the profits accruing after his birth (or adoption.)—*Sadanund Maha-patra* v. *Surjamani Debi.*—S. W. R. Vol. VIII, p. 455.

Under the Mitákshará Law a son is equally entitled with his father as well to the profits of ancestral property as to the property itself from the moment of his birth or adoption.

The father and the son under the Mitákshará Law are in the position of a joint Hindoo family, and when ancestral estates are admitted to exist, the presumption of law is that all the property they are in possession of is joint property until it is shewn by evidence that one member of the family is possessed of separate property. The burden of proof, therefore, is on the member alleging self-acquisition.

Where money derived from ancestral estates is invested, before the adoption of a son, in the purchase of immovable property which continues to exist at the time of the adoption, the adopted son has equally a vested right in that property as he has in any other similar immovable property which the father had it in his power, before the adoption to alienate, but which he did not alienate.* *Sadanund*

* This case is to be found in extenso in the Chapter treating of partition.

Mohapattur v. *Soorjo-monee Dayee* and others.—S. W. Rep. Vol. XI, p. 436.

There is no doubt that an adopted son has all the rights and privileges of a son born.—*Tinkouri Chakrabarti* v. *Dina Nauth Banerjya* and others.—S. W. R. Vol. III, p. 49.

CALCUTTA, S. D. A.—*The 17th of July*, 1855.

JANKEE SINGH (Plaintiff,) Appellant,

versus

JHOTEE SINGH and others, (Defendants,) Respondents.

RADHEY SINGH, Third party.

Right of inheritance of parties, who had got two-thirds by decree of lower Court, held to have lapsed, as their father's death had preceded that of deceased, whose estate was claimed.

Baboo Sumbhoo-nath Pundit for Jankee.—Chutter Singh, father of Shewuk and Khedum, died before Birmo Dutt, therefore they cannot inherit any property left by Birmo Dutt. Proof of this is in the case decided in 1826. Plaint filed in 1821 by Jhakur and Mohesh Dutt, Muneear and Ram Shewuk for himself and Khedun, his minor brother, plaintiffs; wihch evinces that Chutter Singh, father of Shewuk and Khedun had demised in 1821, and Birmo Dutt died in 1822.

Judgment—

Messrs. *B. J. Colvin* and *J. H. Patton*.—In this case the line of argument taken by Kishen Kishore Ghose and Mr. Allan, for Jhotee Singh, is, that those who are alive at the time of the widow's death, and not those who are alive at the time of her husband's death, succeeded to the inheritance; and that therefore Jankee Singh, Ram Shewuk Singh and Khedun Singh are entitled to equal shares, which, as their client Jhotee is in possession, will leave him in possession of two-thirds till evicted by the suit of Ram Shewuk and Khedun. But the foregoing decision in the appeal of Jhotee was given on the ground that he had lost all title by the death of his father before Brimo Dutt, and upon the same ground Ram Shewuk and Khedun Singh have lost theirs, as the death of their

father before Birmo Dutt has been proved by a plaint filed on the 16th of July 1821, in which Ram Shewuk sued with others for himself and minor brother Khedun, which he would not have done had his father been alive then. As, therefore, their right of inheritance had lapsed* once, it cannot accrue to them again by the circumstance of their being alive when the widow died.

The question, therefore, whether the heirs alive at the time of the husband's death or at the time of the widow's death succeed, does not, in our opinion, arise in this case. We reverse that part of the decision of the Principal Sudder Ameen which decrees two-thirds of the property to Ram Shewuk and Khedun, and decree the whole of it to Jankee Singh, with costs, wasilat, &c.

Mr. A. Dick.—The question mooted in this case by the pleaders of Jhotee, was not entered upon yesterday when the Court held, as a point not disputed, that Jhotee Singh's grandfather having died before Birmo Dutt, Jhotee could not inherit. I now find from the authorities referred to, and the precedent of this Court, Vol. III, Select Sudder Reports, pages 106 to 110, that the heirs of the husband, who dies childless and is succeeded by his widow, have no right of inheritance until after the death of the widow; and that, therefore, those in the same degree, who are alive at the time of the widow's demise, inherit alike equally, without advertence to the death of their parent before or after the decease of the husband of the widow. Such is the doctrine of the Dayabhaga as evinced by Macnaghten, and the precedent he cites: and the Pundit who gave the *Vyavasthá*, on which the Principal Sudder Ameen grounded his decision, has informed the Court that there is no difference on the point between the Dayabhaga and Mitákshará. I would, therefore, uphold the decision of the Principal Sudder Ameen.†

Jhotee's claim to inherit is untenable on another ground than that on which the Court rejected it, *viz.*, that he does not stand in the degree of propinquity. But Jankee, Shewuk and Khedun do to Birmo Dutt.—S. D. A. Dec. for 1855, pp. 368 and 380—382.

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* See Colebrooke's Law of inheritance, Chapter II, Section IV, Clause 8, page 24? and Elberling page 78, Section CLXXVI.

† Mr. Dick's judgment appears to be in strict accordance with Hindoo Law.

CALCUTTA, S. D. A.—*The 11th of March* 1858.

Present:

H. T. Raikes, J. H. Patton, and A. Sconce Esq., *Judges.*

Case No. 199 of 1856.

BABOO SHEO-SUHAE SINGH and others, (Defendants,) Appellants,

versus

BULWUNT SINGH and others, (Plaintiffs,) Respondents.

Where it was alleged on one side, that *A*'s daughter's son is *A*'s rightful heir, *A*'s son having died before his father; on the other, that *A*'s son survived his father, and that the son's widow is heir through the son to *A*'s property; decree of the lower Court, in affirmation of the former alternative, upheld.

The plaintiff in this case sued for possession of certain landed property in succession to one Dhiraj Naraen, on the ground that he is the son of Phool Coonwur, Dhiraj Naraen's daughter. His allegation in the plaint is that Dhiraj Naraen had a son Dyal Naraen, who died in 1214, during the life-time of his father, and that the succession consequently reverted to the father and could not go in the line of his son, in right of whom the defendants claim to inherit. He further avers that Dhiraj Naraen at his death was succeeded by his widow Woodwunt Coonwur, whose name was recorded as proprietor of the estate in the books of the Collector in succession to her husband, and who again was succeeded by Phool Coonwur the mother of plaintiff.

The allegation in defence is that Dhiraj Naraen, who died in Assaurh 1222, did *not* survive his son Dyal Naraen, and that consequently Dyal Naraen's succession was not cut off, and that at his death he was succeeded by his widow Rajbungshee Coonwur.

The only point for decision in this case is—whether the son, Dyal Naraen Singh, survived the father, Dhiraj Naraen Singh, or *vice versâ.* It is admitted on all sides that Dhiraj Naraen was the common ancestor of the litigant parties, and the last *male* owner of the property in dispute. The lineal descent, therefore, clearly ran in the line of Dyal Naraen, and if, as asserted by the appellants, *he* outlived his father, the (plaintiff,) respondent has no conceivable cause of action.

Holding, therefore, that the evidence on the record and probabilities of the case as divulged therein fully warrant the presumption

that Dyal Naraen died during the life-time of his father, we see no reason to interfere with the judgment of the lower Court, which we hereby confirm with costs on the appellants.—S. D. A. Dec. for 1858, page 400.

Claim by respondent to succeed to property in succession to her father disallowed in reversal of the judgment of the lower Court, as her father's death had preceded the death of his own father, during whose life-time, her father had not acquired substantive possession of the property in suit as owner and proprietor in his own right, so that it could not descend through him to respondent.—*Mussts. Rupa* and *Jago*, and *Mohunt Dhoman Gossain* v. *Musst. Nouratan Kunwar*.—S. D. A. R. for 1858, p. 239.

CALCUTTA, S. D. A.—*The 5th of April*, 1836.

BYRAM SING and MUSST. SREE PURSOO KOMAREE, Appellants,
versus
SHEEB-SAHI SING for himself and MAHRAJ SING minor son of Gunga-ram Sing deceased, and TEK-NARAIN SING, for himself and RADHA-NATH SING, a minor, Respondents.

The grandsons of the original acquirer of certain property sued, during the life-time of the latter, their paternal uncle, for their shares, under the Hindoo law of inheritance, of the estate acquired by their common ancestor. Judgment in favor of the plaintiffs, on proof that the original acquirer had relinquished his title to the property in favor of his sons.

The respondents instituted this action in the Zillah Court of Bhagulpore against Baboo Bussawun Sing, Byram Sing, Musst. Sree Pursoo Komaree, the wife of Byram Sing, and Bechoo-ram Chowdree, to obtain possession of two-thirds of Mouzah Chuk Kishendeo and others, with mesne profits thereon during the period of dispossession, under the following circumstances.

The plaint set forth, that Baboo Bussawun Sing had three sons: Bhyro Singh, Byram Sing and Gunga-ram Sing. Bussawun Sing amassed considerable wealth by trade, and purchased some landed property. He lived with his three sons as a joint family, giving to Bhyro Sing the superintendence of his affairs at home, while to

Byram Sing he committed the management of matters in the courts of justice and other public offices. On the death of Bhyro Singh and Gunga-ram Sing their sons lived in the same manner with their grandfather and uncle. Thus in the property of Bussawun Sing his three sons had an equal interest, those of them who died being represented by their descendants inheriting *per stirpes*. Byram Singh, however, to the great injury of the plaintiffs, conveyed a part of the property to his wife, and another part he sold to Bechoo-ram Chowdree. On this (that is in the year 1236) the plaintiffs and Byram Sing disagreed and separated, the latter ousting the plaintiffs from the whole of the property which had formed the estate of their common ancestor Bussawun Singh. The plaintiffs claim two-thirds of the estate and sue accordingly. The defendant Byram Sing repelled the claim: he urged that Bussawun Sing was a pauper; that the entire property, of which the plaintiffs claimed two-thirds, had been acquired by himself; that supposing the statement of the plaintiffs to be correct, Bussawun Sing was still alive, and therefore the claim could not be preferred during his life-time.

The defendants Musst. Sree Pursoo Comaree and Bechoo-ram Chowdree replied that they held certain portions of the property under conveyances from Byram Sing.

Bussawun Sing stated in answer that the property had been acquired by himself; that he had appointed Bhyro Sing, his eldest son, to the superintendence of the house-hold affairs, and Byram Sing, his second son, to the management of matters in the public offices; that Bhyro Sing died leaving three sons, that from 1231 to 1235 he lived with his sons and grandsons as a joint family, having made over to them the whole of his property to be taken possession of by them *per capita* and *per stirpes* as if they had inherited it on his death; that then quarrels and disagreements arose between them, and that he then urged upon them a division of the property and separation of the family; that Byram Sing, however, would not follow his advice, but endeavoured to get the whole estate into his own possession; and that he (Bussawun Sing) has now no objection to agree to the claim of the plaintiffs

The Zillah Judge, Mr. C. Harding, was of opinion, that the statement of the plaintiffs in regard to the property having been

acquired with a trifling exception by Bussawun Sing, and to the fact of his and his sons having lived together as a joint undivided family to the year 1235 was clearly proved. There could, therefore, be no doubt that, under the Hindoo law, the sons of Bussawun Sing would have shared equally in his estate on his death. That he was still alive, did not, in the Judge's opinion, constitute any bar to the present action, as he had voluntarily given up his estate to be held by his sons the same as they would have succeeded to it in the event of his death; and that, therefore, there now existed no legal objection to the division of the property between the sons of Bussawun Sing or their representatives. The Judge accordingly gave judgment in favor of the plaintiffs for their full claim, with the exception of a small part of the property sued for, which, it appeared to him, had been actually acquired by Byram Sing.

The defendant Byram Sing and Musst. Sree Pursoo Komaree appealed to the Sudder Dewanny Adawlut.

The Court (present Mr. R. H. Rattray) confirmed the decree of the Zillah Court—Sel. Rep. Vol. VI, p. 65.

A childless widow, having formerly relinquished her claim over her husband's estate in consideration of a certain allowance of money and land, to her brother-in law and his heirs, endeavoured to re-assert her claim to her husband's estate when her brother-in-law died childless, on the plea that the widows of her brother-in-law were not heirs within the meaning of the deed. Claim rejected, the relinquishment having been to heirs generally, and the widows being heirs for the time that is during their lives, and trustees for the ultimate heirs.—*Musst. Amartu* v. *Durga Kunwur* and others.—S. D. Dec. for 1859 p. 245.

CALCUTTA, S. D. A.—*The 12th of June*, 1852.

Present:

J. R. Colvin, Esq., *Judge.*

RADHA-BINODE MISSER, (Plaintiff,) Appellant,

versus

KRIPA-MOYEE DEBIA and others, (Defendants,) Respondents.

A suit brought by a next heir for possession of an estate on the ground of a widow, who had held it on a life-interest, having become a *teeruth-bashee,* or having relinquished all connection with wordly affairs, is a distinct suit from a former one, brought by the same party, seeking possession on the ground of the widow having injured and wasted the estate by unauthorized alienations; and its reception and investigation on its own alleged new circumstances and merits are not barred by any decision passed on the former suit.

That was a case in which the petitioner originally sued during the life-time of one Tara-monee, widow of Ram Doolal Roy, on the ground of her having, though possessing only a life-interest, injured and wasted the property to which he was heir with title of possession upon her death, by unauthorized alienations.

He then instituted the present suit, claiming all the estates in one action upon a distinct ground, *viz.,* that Tara-monee having relinquished all connection with worldly affairs, (having become *tarik-i-dooniya,* or *teeruth-bashee,*) she is to be regarded as civilly dead, and that he has a right to sue for unrestricted possession as heir upon her death, and not, as in the former suit, upon the special ground of restraint of waste, and with a condition of being obliged to afford maintenance to Tara-monee.

The Principal Sudder Ameen considers that this suit is barred by the former judgment of this Court.

This is, however, erroneous. The present suit is brought upon alleged new circumstances which create rights not existing at the time of the former suit, and is entitled to a hearing upon its own merits.

The decision of the Principal Sudder Ameen is, therefore, reversed, and the case remanded to his Court for due investigation.—S. D. A. Dec. for 1852, p. 503.

See the cases between the said Radha-Benode Misser and others (printed at pp. 595—606 of the Cal. S. D. A. Rep. for 1856,)* in which the Court held as follows :—"On the second issue the Court was of opinion that as the appellants had not denied the fact of Taramonee having become a '*Byraghin*' in the Court below, it was not competent to them to do so now ; looking, moreover, to the evidence, before it, the Court agreed with the Principal Sudder Ameen in thinking that it proved satisfactorily the plaintiff's allegation and shewed that the widow Tara-monee had become a *tecruthbashee*, and had renounced the world. The Court was unable to discover that any particular acts are enjoined by the Hindoo religion to render a renunciation of the nature valid,† and as to the particular ceremonies necessary for her becoming a *Byraghin*; they are so unimportant that absence of notice of them cannot weaken the evidence to the fact of Tara-monee having become a *Byraghin*. The Court, therefore, was of opinion that the objections raised in the second issue to the present suit are invalid."

See also Sreemotee Jadoo-monee Debee *v.* Saroda Prosunno Mookerjea and others (printed at page 120 of Bulnois' S. C. Reports Vol. I., and at page 190 of the Vyavasthá Darpana, 2nd edition,) in which the Court (on the authority of Macnaghten as well as the above case,) said : "It is clear that on the occasion of a widow becoming a *Byraghin* the estate would at once descend to the nearest heirs living at the time."

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* The above case is also to be found in the Section relative to widow's succession

† *Vide* Part I of this work.

AGRA, S. D. A.—*The 5th of August*, 1863.

Present:

W. Edwards, Esq., *Judge*, F. B. Pearson, Esq., *Offg. Extra Judge.*

SOORJA (Plaintiff,) Appellant,

versus

BHOWANEE DEEN (Defendant,) Respondent.

Decision of the Court of first instance upheld, in preference to that of the lower appellate Court, which awarded to the defendant an inheritance which he had before disowned and repudiated, when desirous of avoiding the liabilities connected therewith.

The following is the Judge's decision transcribed at length :—

Soorja, plaintiff, claims the landed property of his deceased uncle, on the score of his being his heir, to the exclusion of Bhowanee Deen, defendant, his uncle's brother. Bhowanee Deen declares that Soorja, according to Hindoo law, has no right of inheritance, in preference to him, (defendant,) the deceased's brother.

Plaintiff files in Court copy of a demurrer made by defendant in another case, in which he declares Soorja, plaintiff, to be his deceased uncle's, that is Ram-persad's, heir, and that he (defendant) has nothing to do with him, and contends that this paragraph in the demurrer is tantamount to 'the consent of the members of that family to which it (the property) belongs.' The Moonsiff takes that view of the case, and decrees for plaintiff. Defendant appeals, and his appeal is affirmed, and decree reversed with costs.

The special appellant urges : 1st, that whereas the (defendant) respondent once acknowledged appellant (Soorja) to be the heir of Ram-persad in Court, declaring himself to have no concern with the latter's estate, he cannot claim now, contrary to his former admission, to be the heir of the said Ram-pershad ; and 2ndly, that appellant is also shewn to be the legal heir, under the Vyavasthá supplied by the Sudder Pundit.

Judgment—

The second objection is untenable, but we admit the validity of the first on referring to the petition filed by Bhowanee Deen, on the 15th of February 1859. In the former case, to which the lower

Courts have adverted, we find that having been impleaded as Ram Persad's heir, he denied that he was such, or had succeeded to any portion of the estate left by that person, and declared the present (plaintiff appellant to be his heir, in terms equally distinct and unqualified. It would be contrary to judicial usage and precedent,* as well as to the principles of equity, to allow the (defendant) respondent to claim or to hold for his own benefit an inheritance which he disowned and repudiated when desirous of avoiding the liabilities connected therewith. Whether or not therefore the plaintiff be the legal heir of his maternal uncle, we conceive that his claim must be recognised as good against the (defendant) respondent, who having himself admitted it to be so, is precluded from contesting it. We therefore uphold the decision of the Court of first instance, and set aside that of the lower appellate Court. The appeal is decreed with costs.—Agra, S. D. A. Dec. for 1863, p. 173.

Calcutta, S. D. A.—*The* 17*th of March*, 1812.

Bulraj Rai, (pauper,) appellant,
versus
Purtaub Rai and others, Respondents.

A, having borrowed money of B, pledges certain lands to him, and goes on a piligrimage After 50 years, in which A is not heard of, his heir sues to recover the land on payment of the amount borrowed ; adjudged on presumption of A's death, and the claim not being barred by the rule of limitations.

This was an action brought by Bulraj Rai, on the 16th of December 1806, in the Zillah Court of Goruckpore, to recover from the respondents, possession of three beegahs, nineteen biswas of land, situate in mouza Jokee, pergunnah Deogang; the yearly produce of which was estimated at five rupees.

It was stated in the plaint, that Ajubee Rai, the plaintiff's uncle, had pledged the lands in dispute to the defendants' grandfather for five rupees, under a general condition, that whenever he should repay the money, he should be entitled to redeem the land ; that the

* See case No. 23 of 1853, decided by the Sudder Dewanny Adwalut, North Western Provinces, on 6th July 1853, Shook-deo Dass, and Mudun Mohun, (Defendants) Appellants, *versus* Ameen-ood-deen and others, (plaintiffs,) Respondents.

plaintiff, as heir to his uncle (who, not having been heard of for fifty or sixty years, must be presumed to be dead,) had offered to pay the amount of debt; but that the defendants having refused to accept of it, and to restore the land, he now sued to compel them to do so.

The deed under which the defendants claimed to hold the land in dispute, and which was filed by them in the cause, was in the following words:—"I, Ajubee Rai, have given in trust (orig. *sompa*) my land, to Soobuns Rai, with all the right I possess therein: when I come back, I shall receive it again, but till I come back it will remain in trust *(amanut)* with Soobuns Rai. If any one in my absence shall demand, let him not obtain it."

The above deed was dated the 9th of *Kartick* of the year 1807 *Sumbut*, answering to the year 1751-52. It appeared, that, Ajubee Rai, the plaintiff's uncle, had never returned from the pilgrimage above mentioned, nor had he been heard of since. The Zillah Judge observed in his decree, that the above deed was merely a deed of trust or deposit *(amanut-namah)*, that the defendants having held possession of the land under such deed; the limitation of twelve years could not be considered under Clause 1, Section 3, Regulation 2, 1805, as applicable to the claim of the plaintiff; and that the plaintiff being sole heir of Ajubee Rai (since whose departure more than fifty years had elapsed without any information of his being alive having been received), was entitled to recover. Possession of the disputed lands was adjudged accordingly to the plaintiff, on payment of five rupees, the sum in which Ajubee Rai had been indebted to the defendants' grandfather.

On appeal to the Provincial Court, that Court, in a decree reciting that clause 1, Section 3, regulation 2, 1805, was not applicable to the present suit, reversed the decree of the Zillah Court, and dismissed the claim.

On petition to the Sudder Dewanny Adawlut, the Court called on the Provincial Court to state at length the grounds of their opinion.

On a further petition to the Sudder Dewanny Adawlut, the Court (present J. H. Harington and J. Stuart,) admitted a special appeal, and reversing the decree of the Provincial Court, affirmed that of the Zillah Judge, adjudging possession to the appellant on payment of five rupees. Costs of suit in all the Courts were made payable by the respondent.—Sel. S. D. A. Rep. Vol. II, p. 4.

CALCUTTA, S. D. A.—*The 22nd of June, 1863.*

Present:

The Honorable E. Jackson and the Honorable A. A. Rober
puisne Judges.

Regular appeal from the decision of Roy Taruk-nauth Bidias Principal Sudder Ameen of Behar, dated the 11th of March*

MUSST. MANKEE COER, (Defendant,) Appellant,
versus
KHEDOO LALL, (plaintiff,) Respondent.

According to the Hindoo law a person who has not been heard of for mo twelve years is to be presumed as dead.

The appeal arises out of regular appeal, No. 532, this da posed of, in which appellant is one of the defendants, responde

We have held in concurrence of the lower Court, tha appellant's husband Gopaul Chand not having been heard the last 12 years or more, must, according to Hindoo law, b sidered, dead, and that appellant is not entitled through h band to any share in the estate of her deceased father Choonee Lall; but that she is entitled to a sufficient maint which is to be awarded her in execution of the decree pro in favour of Khedoo Lall in case No. 232.

Appeal dismissed with costs.†—S. D. A. Dec. for 1863,

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* This should be "Tara Caunt," but *sic in orig.*

† It is not stated in this case what was the age of the missing person a left his family. But being a resident of Behar he must have been supposed latter period of life, as otherwise in a province other than Bengal a missing not be presumed as dead at the expiry of 12 years from the date of his See the *Vyavasthás* and the remarks and notes relative to the above in work.

AGRA, S. D. A.—*The 19th of March*, 1862.

Present:

M. R. Gubbins, Esq., J. Lean, Esq., and A. Ross, Esq., *Judges*, W. Wynyard, Esq., and W. Edwards, Esq., *Offg. Extra Judges.*

DILRAJ KOONWUR, female, (Defendant,) Appellant,

versus

SOOLTAN KOONWUR, female, (Plaintiff,) Respondent.

Held contrary to an opinion delivered by the Hindoo law officer of the Court, that where the inheritance of a deceased person was contested between his widow on the one side, and the widow of a son, who had died during his father's life-time, on the other; the latter has, under Hindoo law, no right of share in the inheritance, but a right of suitable maintenance only, and right to any personal property of which her husband had possession during his life.

The Judge's decision was recorded in the following terms:—

Plaintiff sued to establish her own sole right, to (without the partnership of defendants,) the separated Puttee, Ajeet Singh, Talooqua Bhadaol, on the ground that she as the widow of Ajeet Singh, who died without other heirs, is the sole heiress, and that defendant, the childless widow of Ajeet's son who died before his father without even having had possession, has no right to the estate left by Ajeet Singh.

Dilraj Koonwur pleaded that the property being hereditary, the father's and the son's rights were equal.

The Principal Sudder Ameen decided that they were, and gave plaintiff a decree for half the estate claimed, only dismissing the claim to the other half. Against this decision the appeal is brought.

Judgment—

The case having been brought up before a full bench, the majority of the Court, Mr. Wynyard alone dissenting, proceed to record judgment.

The Court observe that the appellant rests her case upon the opinion now delivered by the law officer, and can adduce neither precedent nor other ruling of the Court, nor any other authority in support of it.—On the other hand, the Respondent adduces the

following proofs, to shew that this point of Hindoo law is not an open one, but that besides being clearly laid down in Macnaghten's work, it has been ruled by several precedents in accordance with the Judge's decision. Respondent refers *first*, to Macnaghten's Hindoo law, Volume I, page 32, where it is ruled, that "according to the law as current in Benares, in default of the son, and son's son and grandson, the widow (supposing the husband's estate to have been distinct and separate,) succeeds to the property under the limited tenure above specified."

Here, he urges "the inference is clear, that next in default of male issue the widow inherits."

Secondly, Macnaghten's Hindoo law Volume II, page 106, where it is ruled that "a son's widow has no legal claim of inheritance."—In the case there detailed, in which A represented a father, and B one of his sons, the Pundit's answer ruled that "the right of B to the property left by A is barred by reason of his having died during his father's life-time. His widow, therefore, is not entitled to any share in the property of her deceased husband's father. She is entitled to receive maintenance, therefore, and to take by inheritance during her life, any property of which her husband had possession during his life."

The ruling here must be admitted to be altogether inconsistent with the Vyavasthá of the Pundit now given. Nor is the principle of this affected by the different status in the case as put in Macnaghten, and as now before us, in respect to the non-existence in the present case of other issue of A. For the ruling is absolute, that the right of B is barred by reason of his having died during his father's life-time.

The respondent next refers to a precedent of the Calcutta Court of Sudder Dewanny Adawlut, Case No. 179, dated the 17th of November 1853, Munee-mohun Bose &c. defendants, appellants, wherein we find that it is clearly ruled that "under the Hindoo law, on a son dying before his father, the son's widow is precluded from claiming ancestral property as heir to her husband." In that case, the Calcutta Court ruled as follows: "We hold that the plaintiff's claim is altogether inadmissible under Hindoo law, by which, a son dying before his father, the son's widow is precluded from claiming ancestral property as heir to her husband."

Lastly, the respondent quotes a decision of a full bench of this Court dated 14th March 1859, Nos. 185 & 186, Mussummat Bhooriya Ooman Koonwaree, defendant, appellant, where it was ruled (see judgment at page 55,) that "the widow of the son, who died in the life-time of his father, has no share in the inheritance of ancestral property."

We observe that in the last quoted precedent, the widow, whose claim was disallowed, was the relict of an elder son who had died during his father's life-time; and was arrayed against her sister-in-law, the widow of a younger son, who had survived the common father. The case before us, is *a fortiori* one against the defendant, for she is arrayed not against her sister-in-law, but against mother-in-law, the widow of her deceased husband's father.

We thus find that the ruling laid down in Macnaghten's Hindoo Law and the two clear precedents of this, and the Calcutta Court, affirm the principle that the widow of a son who died in his father's life-time cannot claim a share in hereditary property, while in support of the contrary ruling, there exists only the unsupported opinion of the Court's present law officer.

We are clearly of opinion that the weight of authority is altogether on the side of the plaintiff, respondent.

We accordingly affirm the decision of the Judge in favor of the plaintiff, respondent, and dismiss the appeal with costs; reserving, however, in favor of the defendant, appellant, what the Judge has omitted to do, viz., the right of a suitable maintenance out of the property left by her father-in-law, Ajeet Singh, together with any personal property of which her husband had possession during his life.

Mr. W. Wynyard's opinion.—I am of opinion that the decision of the Judge should be reversed. The Sudder Pundit has declared that Hindoo law in the particular case, which was put to him in the annexed question, is as follows:—

Question.—A, a Hindoo died leaving as his sole heirs B, his widow, (second wife) and C, the widow of D, his son by a former wife. D, having died in his father's life-time, in what proportions are B, and C, entitled to share in the hereditary property?

Answer.—"In the same way as father and son possess rights in property, so where neither of the female claimants have issue their

right is equal, because both are bound to offer the *pind* at the obs quial ceremonies of their deceased husbands, and their husban fathers, &c. Therefore, are they entitled to the share of their hu bands, neither can sell or transfer without the consent of the oth except for the purpose of performing the *shradh* of the husba Given according to the Mitákshará."

The Pundit holds that there is one law for a daughter-in-la claiming against her mother-in-law, when there are no other hei and another law when there are other parties who have a title succeed. There is to my mind a marked distinction between t present case and all the cases quoted, and as nothing that has be adduced in argument, or produced in proof, convinces me that t Hindoo law as laid down by the high authority of the Pundit this Court is not correct, I would accept it and reverse the decisi of the Judge.*—A. S. D. A. Dec. for 1862, p. 240.

Claim to ancestral family estates and personalty upheld in a peal on the rule of Hindoo Law, by which the widow of a son, wl dies in the life-time of his father, is excluded from a share in tl inheritance, although entitled to maintenance.

Registration in the Collector's office of the widow's name jointl with that of the surviving son, after the father's death, held to con vey no title to half the estate, real and personal, of the ancestor failing proof of an agreement to that effect, or acquiescence in such agreement by the widow of the son, who survived his father.

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* The falacy of the Pundit's opinion will be detected by the perusal of the follow ing principle :—"But it is perfectly intelligible that upon the principle of survivorshi the right of the co-parceners in an undivided estate should override the widow's right succession whether based upon the spiritual doctrine or upon the doctrine of surviv ship." "According to the principles of Hindoo law, there is co-parcenership betwee the different members of a united family, and survivorship following upon it. There i community of interest and unity of possession between all the members of the famil and upon the death of any one of them the other may well take by survivorship th in which they had during the deceased's life-time a common interest and commo possession." Privy Council. *Vide* Moore's India Appeals Vol. IX, p. 611, and Suthe land's Privy Council Judgments, p. 530. The above is the correct principle of t Hindoo law as current in all the schools except the Bengal school. Had an undivid brother or brother's son survived the deceased instead of his father (before whom h right was rather inchoate,) even in that case, that parcener would have excluded t widow and taken by right of survivorship. In the present case the undivided fath having survived his son, whatever right the deceased son had by birth devolved o and vested in, the survivor to the exclusion of his (the son's) widow. Subsequentl the father having died leaving his own widow, the latter inherited from him by rea of there being no co-parcener of her husband the last male and sole owner of the p perty in dispute, and his daughter-in-law having no right by birth to represent h husband, or to inherit from her father-in-law. The grounds upon which the ab principle is based are to be found in Part I, Sect. i. of this work.

Claim to certain estates, purchased in the name of the son who died in his father's life-time, by his widow, rejected on failure of proof that the purchase conveyed a *bonâ fide* separate title to the son, the father having been registered as proprietor after the son's death, and the presumption being that the legal and beneficial interest remained in the father.

Widow of the son, who died during his father's life-time, entitled to maintenance out of the estates.

Decree of lower Court, awarding refund of monies paid by the Court of Wards as maintenance, modified.—*Musst. Bhooriyah Ooman Coonwaree* v. *Doolhun Khem-kurun Coonwaree.*—Agra S. D. A. Dec. for 1859, p. 52.

There being a community of interest and unity of possession between all the members of a united family having common property, it follows that, upon the death of any one of them, the others may well take by survivorship *that* in which they had during the deceased's life-time, a common interest and common possession.

But the law of partition shows that, as to the separately acquired property of one member of a united family, the other members of that family have neither community of interest nor unity of possession. The foundation, therefore, of a right to take such property by survivorship fails; and there are no grounds for postponing the widow's right to inherit it to any superior right of the co-parceners in the undivided property. *Kattama Nauchear* v. *The Rajah of Shiva-gungah.*—Privy Council. Moore's India Appeals, Vol. IX, p. 610. Sutherland's Privy Council Judgments, page 520.

The sound rule to lay down with respect to undivided or impartible ancestral property is, that all the members of the family who are entitled to unity of possession and community of interest, according to the law of partition, are co-heirs irrespective of their degrees of agnate relationship to each other, and that on the death of one of them leaving a widow and no nearer *sapindas* in the male line, the family heritage, both partible and impartible, passes to the survivor or survivors, to the exclusion of the widow. But when her husband was the last survivor, the widow's position as

heir, relatively to his other undivided kinsmen, is similar to h position with respect to his divided or self and separately acquir property.—*Sri Rajah Agenumula Gavuridivamma Garu* v. *S Rajah Agenumula Rumanodra Garu.* 6 Mad. H. C. Rep. p. 9

When it is sought to exclude female heirs in succession to husband or father, under the Mitáksharâ, on the ground that t estate was joint, it must be shown to have been so at the time his death, and not merely at the time of a predeceasing brother, w was father of the complainant.—*Musst. Pitam Kunwar* al *Moran Bibi* v. *Joy Kishen Das,* and others.—S. W. R. Vol. V page 101.

According to the Mitákshará law, a conveyance or transfer joint property by one member of a family is illegal without the co sent of the other members.

By the same law, widows have no part in their husband's jo estate, and the mere fact of the husband having treated a prope as his own, so far as to mortgage it during his life-time, is no s ficient reason for the conclusion that the property was his separ property, and as such descended to his widows.

According to the same law, an estate cannot be burdened w the debts of one of its joint owners after that person's decease. *Lewis Cosserat* v. *Sudabert Persad Sahoo.*—S. W. Rep. Vol. I page 210.

Admitted legal opinions.

Retirement from the world operates as natural death.

Q. A person dies, leaving a widow, and two sons of his broth the widow is living, but has quitted the order of a housekeep and retired from the world. She had not executed any deed eitl of gift or sale in favor of her husband's nephews. In this case, they entitled to the property, by reason of the extinction of l temporal affections?

If the widow have really relinquished her right to her husband's property, and quitted the order of a house-holder, her husband's brother's sons become entitled to the property left by her, notwithstanding the fact of her not having made any provision in their favour.*

City of Dacca, June 16th, 1823.—Macn. H. L. Vol. II, Chap. iv, Case iii.

Retirement from the world is civil death, according to the Hindu law.

Q. Is a *Brahmin,* whose eldest brother, leaving his ancestral and self-acquired property in joint state with him, had entered into the order of a religous student, and is still living, competent to make a verbal gift of the whole undivided estate to his daughters, or otherwise ?

R. When the eldest brother, having left the order of a housekeeper, entered into that of a religious student, his right to the paternal estate became extinct; therefore the gift of the undivided property made by the younger brother to his daughters is legal and valid.

Authorities.

The text of *Vasishtha,* as laid down in the *Ratnákara* and other books of law. "They who have entered into another order, are debarred from shares."

Zillah Burdwan, January 15th, 1817.—Macn. H. L. Vol. II, Chap. viii, case xxv.

The wife of a person who has been missing for 55 years has no right to claim his share of the joint property, according to the law of Benares. But has a right according to the law of Bengal.

Q. A person had a family by two wives, namely, by the first wife a son, and by the second two sons. These three brothers continued to live together as a joint and undivided family; and some time after, one of them, being the issue of the first wife, pro-

* Retirement from the world is, according to the Hindu law, a species of civil death, on which, as in the case of natural dissolution, the rights of the heirs immediately begin to exist.—Note by Macnaghten.

ceeded to a foreign country, and no intelligence concerning him has been received for the period of fifty-five years, during which time his wife lived under the protection of his brothers, who managed the estate as before. Now the wife of the missing person claims the share of her husband. In this case, is she entitled to her husband's legal share, or only to her proper maintenance ?

R. Supposing the wife of the missing person to have lived with her husband's brothers as a joint and undivided family for the period of fifty-five years, her claim is inadmissible and illegal, according to the law of Benares.

Authorities.

Boudhâyana, after premising, " a woman is entitled, &c." proceeds, " not to the heritage ; for females, and persons deficient in an organ of sense, or member, are deemed incompetent to inherit."

It should not be argued, that the wife of a missing person, regarding whom intelligence has not been received for fifty-five years, has any right to her husband's share of the joint ancestral landed property.

Nárada says : " Among brothers, if any one die without issue, or enter a religious order, let the rest of the brethren divide his wealth, except the wife's separate property. Let them allow a maintenance to his women for life, provided these preserve unsullied the bed of their lord."

Q. How would the law in this case be in Bengal ?

R. According to the law as current in Bengal, the widow would be entitled to her husband's share.

Zillah Sarun.—Macn. H. L. Vol. II, Chap. I, Sect. ii, Case ix.

Sons' sons whose fathers are missing inherit equally with sons.

Q. A person died leaving seven sons, four of whom, after a lapse of time, were missing, and the remaining three took possession of the paternal estate, confiding the management of it to one of their number. In this case, will the property of the deceased devolve on his three sons and the missing son's sons ?

R. The deceased proprietor's grandsons, whose fathers are missing, are entitled to share the property with his sons according to their father's shares.* From the circumstance of the management being confided to one of them, the right of the others cannot be divested. This opinion is conformable to law.

Authorities.

"When the father is dead," &c. (*Dáya-bhága*, page 9.)

"Among the issue of different fathers, the allotment of shares is according to the fathers."

"And the dissipation of their hereditary maintenance is censured."

Zillah Shahabad, June 20th, 1804.—Macn. H. L. Vol. II, Chap. I, Sect. i, case vii, page 9.

A woman has no claim to her missing husband's share of his father's property. The time allowed for the re-appearance of a missing person is 12 years, after which his death is to be presumed.

Q. 1. A person, ten years before his father's death, forsook his family and resided in another country, and no intelligence has been received regarding him since his departure. Is his wife, im-

* According to the Hindoo law, the term "missing person" implies a civil death, which should be presumed after the expiration of twelve years, (or twenty, according to another authority,) from the date of such person's forsaking the family, supposing that during this interval no intelligence of him has been received. At the end of such period, he is to be considered as dead, and his heirs succeed to his property. According to some authorities, however, the term of twelve years applies to missing persons whose age exceeds fifty years; and for all under that age the term allowed for re-appearance is twenty-four years. According to the *Nirnaya-sindhu*, there are three periods allowed for a missing person: in the first period of life, twenty years; for one of middle age, fifteen; and for one in the latter period of life, twelve years.—Elem. Hindoo law, App. p. 246. It is not distinctly stated in this case, how long the four sons were absentees. If they were missing longer than the time allowed for re-appearance, then their sons are entitled absolutely to their respective shares; otherwise, they, according to the law as current in Benares, are entitled to a moiety only of their respective fathers' portions; and they are entitled also to the management of the other half, as their proprietary right over the grandfather's estate during the father's life-time is recognized in the following extract from the *Mitákshará*:—"In such property as was acquired by the paternal grandfather, through acceptance of gifts, or by conquest, or other means, (as commerce, agriculture, or service,) the ownership of father and son is notorious; and therefore partition does take place. For, or because, the right is equal, or alike, therefore, partition is not restricted to be made by the father's choice; nor has he a double share." But according to the law as current in Bengal, they have a right to the management only of their missing fathers' shares, and they cannot compel their uncles to come to a partition of the paternal estate with them, as their right over such property is suspended until their fathers' death.- Note by Macnaghten.

mediately on the death of his father, entitled to institute a suit for her husband's share of the patrimony against his two brothers of the half-blood?

R. 1. The wife of the missing person has no right to claim her husband's share of the patrimony, but she must be provided by his brothers with food and raiment.*

Q. 2. What is the time fixed by law, at the expiration of which a missing person is to be considered as dead?

R. 2. Should a person have proceeded to a foreign country, and no intelligence of him have been received for the space of twelve years, he is, at the end of that period, to be considered as dead, and his exequial ceremonies should be performed by his representatives. Should they not then perform such ceremonies, they act sinfully.†

Manu says: "And their childless wives, conducting themselves aright, must be supported; but such as are unchaste, should be expelled; and as, indeed, should those who are perverse."‡

City Patna, August 28th, 1804.—Macn. H. L. Vol. II, Chap. I, Sect. ii, Case viii.

In the case of apostacy from the Hindoo faith, property acquired before the conversion will go to the Hindoo heirs; but that acquired subsequently, will be distributed according to the law of the new religion.

And a Moosulmaun widow of such apostate Hindoo will have no right to his previously acquired property.

Q. 1. A person of the Hindoo persuasion having become a convert to the Moohummudan faith, on whom will the property which descended to him from his forefathers, and that which he himself acquired, devolve?

R. 1. Whatever property he, previously to his conversion, was possessed and seized of, will devolve on his nearest of kin who professed the Hindoo religion; and whatever he acquired subsequently to his conversion, will go to the person, who, according to the Moohummudan law, becomes his legal heir.

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* This is not the law of Bengal.

† But see the foot note at page 39.

‡ *Yájnyavalkya. Vide* Mitákshará, page 329.

Authorities.

Manu:—"All those brothers who are addicted to vice, lose their title to the inheritance."

Sankha says,—"The heritable right of one who has been expelled from society, and his competence to offer food and libations of water, are extinct."

There is no authority which enjoins that the children by a Moohummudan woman should be permitted to inherit from their putative father.

But *Bhrigu* declared, that 'whatever customary law of a country, a class or tribe, a company of *merchants and the like*, or of a town, should be alleged and proved, the distribution of an inheritance must be respectively made according to that custom.'—*Cátyáyana.*

Q. 2. A Hindu had two sons, whom he disposed of in marriage to their equals in tribe, rank of life, and condition. The eldest son had a son by his Hindu wife, and subsequently both the brothers became converts to the Moohummudan faith; but the son of the eldest brother and the wife of the second continued to profess their own religion. After conversion, one of the sons (the second) died. Now there are three claimants to his estate, namely, his nephew, his Hindu widow, and his Moohummudan widow. In this case, will the property which he possessed previously to his conversion devolve on his Hindu widow or on his nephew?

R. 2. Under the circumstances above stated, if a partition of the estates had been made by the sons of the original proprietor, and they lived apart, the Hindu widow is entitled to the inheritance; and supposing them to have lived together as a joint and undivided family after their conversion, the nephew should be declared entitled to the succession.—Macn. H. L. Vol. II, Chap. IV, Case iv.

The claimants being a brother's son and a widow, the former will take the property if the family was joint; but the latter if separate, according to the law of Benares.

Q. An individual had two sons, A and B. The eldest (A) died before his father, leaving a son and a widow. Subsequently the father died, leaving a family consisting of B and his wife, and

A's son and widow; and at his death he also left some landed property. Some time after this, the son (B) died, leaving his widow, and his brother's son and widow him surviving. In this case, what proportions of the property of B will respectively devolve on the eldest son's son and widow, and on the younger son's widow?

R. If A's son, his widow, and the widow of B, lived together as a joint family at the time when B died; according to law, A's son is alone entitled to the estate, but it is necessary for him to provide B's widow with food and raiment equal to her condition of life. If they formerly lived apart, and the share of B was separated, then his widow is entitled to the property which fell to her husband's legal share. A's widow has no right of succession, but she must be provided by her son with proper maintenance.

Zillah Moradabad.—Macn. H. L. Vol. II, Chap. I, Sect. ii, Case x.

Responsa Prudentum.

According to the Mitákshará, sons have interest in the patrimony by birth; and, in property ancestral, have an equal right with their father. (Mit. on Inh. ch. i. sect. i. § 27; and sect. v. § 3.) The sequel of this opinion, regarding the arrangement to be made in the absence of the father, supposed to be dead, is consistent with the law: but the son's concurrent interest in the patrimony would not be a reason for disturbing an arrangement made by a father to provide for his absence, if there were reason to believe him still living. C.

Str. H. L. Vol. II. (2nd. Ed.) p. 316.

Veerakah *v.* Veneatanarnapah.

The plaintiff is a widow, whose husband died in the life-time of his father, no division of property between the father and son having taken place, and the son not having acquired any in his own right. The Defendant is the father, and the Plaintiff's own family are unable to maintain her.—What are her claims?

Answer.

Had the deceased left male issue, they would have inherited to their grandfather at his death, by right of representation. But no

such right vests in the widow. She is entitled, however, to look to the defendant, the father of her deceased husband, for maintenance; and, whatever she possesses as *Strí-dhana*, is her own.

Remarks.

Mit. on Inh. ch. ii. sect. i. and ii. C.

The opinion of the Pundit is correct. The widow is heir to her husband only where he dies separated from his co-heirs, as well as without male issue. S.

Stra. H. L. Vol. II, (2nd. Ed.) p. 233.

A person having quitted home, and no intelligence of him having been received by his family, if he was from thirty to thirty-five years of age at the time of his departure, his return must be expected for twenty-one years, counting from the day he set out. If from forty to forty-five years, he must be expected for fifteen; if from sixty to sixty-five, for twelve: at the expiration of the respective periods, without any certain account of him having been received, his heir having performed three *chándráyanas*,* must make an image of his missing ancestor, composed of twigs of the *Palása* tree, or *Durbá* grass, and burn it; after which, observing the ceremonies usual on death, he may take possession of his property: but, until the respective periods above stated be passed, the *missing* is the sole owner, nor can his heirs claim the inheritance.

(Sd.) NIRBHUYA-RAM, *Sastree.*

Remarks.—Játakarna, quoted in the *Nirnayámrita,* declares, "One whose father is absent, and of whom there is no intelligence, must, after fifteen years, make an image of him, and perform his funeral rites in the prescribed form."—The *Grihyakáriká* is cited in the *Nirnaya-sindhu* for the following text: "If he be in the first period of life, the rites are directed after twenty years; if he be of middle age, after fifteen; but, in the latter period of life, after twelve. His sons having performed three *chándráyana** fasts, or thirty austere ones, must burn an image of him made of *kusa* grass, and observe the mourning and other rites." C.

Stra. H. L. Vol. II, (2nd. Ed.) p. 237.

* *Chándráyana,* compounded of *chandra,* the moon, and *ayana,* motion and means *lunar month.*

CHAPTER II.

RELATIVE TO A SON'S AND GRANDSON'S CONCURRENT INTEREST OR CO-ORDINATE RIGHT &c., WITH THE FATHER AND GRANDFATHER, AND EFFECTS OF SUCH RIGHT.

SECTION I.

EXTENT OF THE RIGHT AND POWER OF A FATHER, SON AND GRANDSON OVER ANCESTRAL AND OTHER PROPERTY.

CALCUTTA, S. D. A.—*The 28th of July,* 1813.

Present:

H. Colebrooke and J. Stuart, *Judges.*

SHAM SINGH, Appellant,
versus
MUSSUMMAUT UMRAOTEE (on the part of KALEE-SUR'SINGH, a minor,) Respondent.

By the Hindoo law, as current in Mithila (Tirhoot), a father cannot give away the whole ancestral property to one son, to the exclusion of his other sons.

This was an action brought by Sham Singh in the Zillah Court of Bhagulpore, on the 11th of August 1804, or the 28th of *Sawun* 1213 *Fuslee,* to recover from Mussummaut Umraotee possession of a half share of the talook of Bikrampore Chukramy of a purgunnah called Chye, and of the mouza of Jypoor Chohur, the annual *jumma* of which was stated at 6,464 rupees. It was set forth in the plaint, that an ancestral estate, comprising the talook of Bikrampore Chuckramy and the purgunnah of Chye, had descended by inheritance from Hurhur Singh to his two sons Jograj Singh the father, and Udbhoot Singh the uncle, of the plaintiff; that

Udbhoot Singh being the elder of the two, his name was according to custom registered in the office of the Collector, but, that they transacted their affairs together, and jointly shared the profits of the estate; that Jograj Singh, having died in the year 1192 *Fuslee*, the plaintiff succeeded, in right of his father, to partnership with his uncle Udbhoot Singh; that, during their partnership, his uncle purchased with the profits of the ancestral estate on their joint account, but in his own name, the mouza of Jypoor Chohur and another village; that, in the year 1210, his uncle died, leaving his widow Umraotee and two sons, Kalee-sur Singh, and Zalim Singh; that, in the same year, a proclamation was issued by the Collector of the Zillah of Tirhoot, (in which district the estate was then situated, but from which it had been subsequently separated and annexed to that of Bhagulpore), requiring the attendance of any heir of the late Udbhoot Singh, for the purpose of forming the settlement for the land revenue due on the estate; that, at this time, the plaintiff was precluded by severe illness from hearing of this proclamation; that the defendant Mussummaut Umraotee appeared as heir to Udbhoot Singh, and having procured the settlement of the whole estate to be concluded in her own name, took possession of the same, and wrongfully withheld from him the half share, which he now sues to recover.

The defendant Mussummaut Umraotee denied in general terms the truth of the plaintiff's statement, and alleged, that, Hurhur Singh had a short time before his death, in the year 1182 *Fuslee*, made a gift of the whole of the estate to his eldest son Udbhoot Singh, her late husband, with a stipulation of a pecuniary provision for the younger son Jograj Singh, the father of plaintiff; that, in the following year, Udbhoot Singh took possession of the estate, which he continued to enjoy as sole proprietor until the year 1210, the date of his decease, previous to which he bequeathed the estate to his eldest son Kalee-sur Singh, a minor, and provided for the management of it by the defendant, during the period of his minority; that, the plaintiff's father had never enjoyed any share of the estate, in partnership with her late husband; and that the plaintiff had consequently no right to the portion which he claimed.

The Pundit of the Zillah Court, to whom the Judge made a reference on the subject of the validity of the gift, alleged by the

defendant to have been made by Hurhur Singh, in favour of her deceased husband, declared the gift by a father of the whole of ancestral immovable estate to one of his sons, to the exclusion of another (where that other was not necessarily disqualified from participation, on account of some defect, natural or incurred,) to be illegal; and stated, that sons were entitled to equal participation in an ancestral estate. On the ground of this opinion, and of the evidence adduced by the plaintiff, which proved the purchase of Jypoor Chohur and the other village by Udbhoot Singh, on their joint account, possession of the half share claimed by the plaintiff was decreed to him in the Zillah Court.

On appeal by the defendant from the above decision to the Provincial Court of Patna, that Court having received an opinion from their Pundit, declaring the gift whereby Hurhur Singh was stated to have conferred the whole of his ancestral immovable estate on his eldest son Udbhoot Singh to be valid, a judgment was passed, reversing the decree of the Zillah Judge, and adjudging the plaintiff entitled to maintenance only from the defendant.

On a further appeal being preferred to the Sudder Dewany Adawlut by Sham Singh, it appearing that the estate, to the half of which the appellant laid claim, had been generally considered as situated in the province of Mithila, and the parties themselves having, in answer to a question put by the Court, admitted that their religious ceremonies connected with funeral and marriage and other observances were governed by the Mithila *shaster*, the opinions of the law officers of this Court, of the Provincial Court of Patna, and of the Zillah Court of Tirhoot, were required as to the legality or otherwise (according to the Mithila *shaster*) of the alleged gift by Hurhur Singh of the whole immovable ancestral estate to his eldest son Udbhoot Singh. The Pundits of the Zillah and Provincial Courts differred in opinion with regard to the law in this case, such gift being pronounced invalid by the Pundit of the former Court and valid by that of the latter. The Pundits of this Court were called upon to state under the Hindoo law, as current in Mithila,—1st. Whether the gift pleaded by the defendant was valid? 2nd. Whether such gift would be complete without seizin being given during the life-time of the donor? They expressed their opinion as follows:—1st. If a Hindoo possessing immovable

ancestral property, sometime previous to his death, express himself to this effect in talking of his eldest son, " he will become sole proprietor on my death, and my younger son will be provided by him, with a suitable maintenance;" the gift cannot take place, from the omission of the word *dán* (donation) in the expression, which, both according to the *shásters* and the current practice of the country, is essential to complete the gift: further, supposing the word *dán* (donation) to have been expressed in the above sentence, still the gift cannot be considered valid, because a father and a son possess an equal right in ancestral immovable property; consequently, the younger brother's right is established, and the estate becomes joint property, the gift of which is illegal, and a verbal gift, under any circumstances of immovable property unless supported by a *hibba-namah*, is invalid. The authorities agreeably to which this *vyavasthá* has been delivered, are the *Viváda Ratnákara, Smriti Samooch-chaya, Vivada Chandra, Vivada Chintámani*, and other works current in *Mithilá*.

The first authority is the text of *Yájnyavalkya* recorded in the *Viváda Ratnákara, Smriti Samoochchaya*, and other treatises: "The right of a son and a grandson, in property acquired by a grandfather, whether landed or other property, is equal."

The second authority is quoted in the *Vivada Ratnákara*, and is as follows: " The shares of ancestral property, to which a son and a grandson will respectively succeed, are neither greater nor less than each other; the son of the deceased has no option to give it away."

The third authority is the text of *Vrihaspati* cited in the *Viváda Ratnákara, Smriti Samoochchaya, Vivada Chandra*, and other authorities, and is as follows: " The right of a son and a grandson in property, movable or immovable, acquired by a grandfather, is equal," and in the *Vivada Chandra* it is thus written, " a grandson's right in property acquired by the grandfather is recognized, even during the life of the son."

The fifth authority is a text of *Vrihaspati*, cited in the *Vivada Chintámani, Vivada Ratnákara, Vivada Chandra*, and other authorities, to this effect: " There are eight things of which a gift cannot be made, 1st, joint property; 2nd, a son; 3rd, a wife; 4th, a pledge; 5th, his whole estate; 6th, a deposit; 7th, property borrowed for use; 8th, anything which he has promised to another."

The sixth authority is cited in the *Viváda Chintámáni*; "There is no right over three things, 1st, joint property; 2nd, a son; 3rd, a wife; and any gift made of them is invalid."

The seventh authority is cited in the *Smriti Samoochchaya* and other books: "A verbal mortgage of immovable property, for a period of ten years, provided it remain in the hands of the mortgagee, is valid; a gift is not valid, unless there be a deed executed between the donor and donee."

The eighth authority is the text of *Marichí* to this effect: "Sale, mortgage, partition, or gift of immovable property is valid, provided there be a deed executed to that effect in which case all cause of complaint is removed."

2nd, Supposing the donor to have made a gift of the above-mentioned property, but not to have given the donee seizin during his life-time, the verbal gift is invalid, because the donee has never been in possession of it. This opinion has been delivered agreeably to the *Viváda Chintámani* and other books current in Mithilá. The first authority is a text of *Yájnyavalkya*, recorded in the *Viváda Chintámani* and other works, and is as follows: "A deed of gift, unless there should have been seizin of the property, is invalid." The second authority cited in the *Viváda Chintámani* is to this effect: "Even supposing that a *hibba-namah* has been executed, the donee's right to the property is not established, unless he shall have been seized in the same." The third authority is the text of *Nárada* cited in the *Viváda Chintámani* and other authorities, which is to this effect: "Granting that there be a deed and credible witnesses, no right can thereby be produced, if seizin of the property have not been given."

In conformity to the above exposition of the Hindoo law, final judgment was passed by this Court (present H. Colebrooke and J. Stuart), affirming the decree of the Zillah Judge, and reversing that of the Provincial Court.—Sel. Rep. Vol. II, p. 74. (New Ed. p. 92.)

CALCUTTA, H. C. A.—*The 29th of May,* 1867.

Present:

The Honorable F. B. Kemp and F. A. Glover, *Judges.*

Case No. 364 of 1866.

BABOO BEER KISHORE SUHYE SINGH and others, (Plaintiffs,) Appellants,

versus

BABOO HUR-BULLUB NARAIN SINGH and others, (Defendants,) Respondents.

According to the Mitákshará law, a son has an equal right with his father in ancestral property. He can compel the father to divide the property during his life-time; and any alienation by the father made after the birth of the son without the consent of the son, unless for a purpose justified by the Hindoo law as a legal necessity, will not bind the son. If the father, during the minority of the son, alienated any property in fraud of his creditors, such fraud would not bind the son who was neither a party nor a privy to such fraud.

In a suit by the son to set aside an alienation by the father, limitation runs from the date of alienation or of possession under it, unless the son was under legal disability owing to minority at the time of alienation, in which case (according to Section ii, Act xiv of 1859) the suit must be brought within three years from the time when the disability ceased.

According to Section ii, Regulation xvi, of 1793, the minority of a proprietor of an estate paying revenue direct to Government extends to the end of the eighteenth year.

Kemp, J.—This is an appeal from the decision of Mr. H. R. Madocks Judge of Bhagulpore, dated the 13th of August 1866. It appears that the plaintiff, to enable himself to raise funds for the prosecution of this suit, has sold a moiety of his claim to other parties who have been made co-plaintiffs.

The suit is for possession and registry of name in the Collector's rent-roll by adjudication of right and title in certain estates, which the plaintiff alleges were ancestral properties and which have devolved to him in right of inheritance. The suit is valued at Rs. 24,997, of which rupees 23,225 are claimed as mesne profits. The cause of action is said to have accrued from the death of the father of the plaintiff which took place on the 11th of Magh 1271 F. S.

It is alleged in the plaint that the villages, the subject of this suit, formed the ancestral estate of Zalim Singh, the father of the plaintiff Beer Kishore; that in such property, according to the Hin-

doo Law as laid down in the Mitáksharâ, the father and the son have an equal title, that without the consent of the son and in the absence of any legal necessity, alienation by the father of any portion of such ancestral estate is invalid: that Zalim Singh, contrary to the Hindoo Law and without legal necessity, alienated the estates claimed to one Lalljee Mull, who afterwards re-sold them to Mussummat Shambuttee Koonwar, the wife of the said Zalim Singh; that, subsequently, some of the properties passed in satisfaction of a decree against Mussummat Shambuttee to the first defendant, Baboo Hurbullub Narain Singh, the sale in execution having taken place on the 16th of April 1857; that the defendants, Nos. 2, 3, 4, and 5, are in illegal possession of a six anna share in certain estates in virtue of a sale by the said Shambuttee who had no power to alienate the remaining 10 anna share being in the possession of the defendant No. 1 in virtue of a purchase in execution of a decree against Shambuttee.

The plaintiff, it is obvious, had an equal right with his father in the ancestral property; he could compel his father to divide the property during his life-time, and any alienation by the father made after the birth of the son, without the consent of the son, unless for a purpose justified by the Hindoo Law as a legal necessity, would not bind the son. If, therefore, the father, during the minority of the son, alienated the properties in fraud of his creditors, such fraud would not bind the son, who was neither a party nor a privy to such fraud.

In the present case the son does not claim through his father, his title is from birth—a title wholly independent of, and equal to that of, the father. The acts of the father, even if fraudulent, are clearly not binding upon the son.

After considering the argument on both sides and the evidence adduced, we are clearly of opinion that the alienation by Zalim Singh to Lalljee in November 1841 was not a sham.

In deciding this question, we have to consider, *first*, when was the plaintiff born? *Second*, when did the plaintiff's cause of action arise?

On the first point the Judge has held that the plaintiff was born subsequently to the alienation by his father Zalim Singh to Lalljee, which took place in November 1841. If this finding be correct, the

plaintiff must fail, and this much his learned Counsel admits. After hearing the whole of the evidence read, we are of opinion that the evidence adduced by the plaintiff is more satisfactory than that adduced by the defendant. The plaintiff has been examined, and he gives the date of his birth as prior to the alienation; his witnesses, who from their connection with the family, were in a better position to remember events of this description than the witnesses for the defendants, depose to the same effect. We are not disposed to attach the same importance to the evidence of the witness Byjnauth Jha as the Judge does.

Finding, therefore, that the plaintiff was born before the alienation, we proceed to consider when his cause of action arose.

The plaintiff was born in 1841; he was, therefore, under the provisions of Section ii, Regulation xvi, of 1793, of full age in 1859. This suit ought therefore to have been commenced within three years from the time when the disability ceased (Section ii, Act XIV of 1859;) but it was not instituted until 1866, and it is therefore clearly beyond time.

Being therefore of opinion that the suit of the plaintiff is barred under the Statute of Limitation, we reverse the decision of the Judge, and dismiss the plaintiff's claim and this appeal, decreeing the cross appeal of the defendants Nos. 1, 2, 3, 4, and 5 with costs of both Courts bearing interest.

With reference to the case of the defendants Nos. 7 and 8, we observe that they claim through a deed of gift made by Zalim Singh to his eldest son Brij Bhookun Singh in 1837. The plaintiff by his own statement was born in 1841. In this case too the plaintiff in his examination admits this deed of gift, and the fact of the separation of the donee Brij Bhookun from his father Zalim Singh, the donor receiving as his share the estates covered by the deed of gift. It is, therefore, clear that the plaintiff's claim as against these defendants is wholly untenable, and that his plaint and appeal must both be dismissed with costs of both Courts payable with interest by the plaintiff to the defendants Nos. 7 and 8.—W. R. Vol. VII, p. 502.

CALCUTTA, H. C. A.—*The 12th of April,* 1869.

Present:

The Honorable J. P. Norman and E. Jackson, *Judges.*

Case No. 2560 of 1868.

PROTAP NARAIN DOSS and others, (Defendants,) Appellants
versus
THE COURT OF WARDS, (Plaintiff,) Respondent.

Where a *Mukurrurec* lease, at a nominal rent, of a small portion of ancestral property was granted for long and faithful service to the *Dewan* of the family by the father without the concurrence of his infant children, the grant was held to be invalid under the Mitákshará law.

Norman J.—This is an appeal from the decision of the Additional Judge of Bhagulpore. The question is, whether under the Mithila law, a *Mokurruree* lease of 100 beeghas of land, a very small portion of the ancestral estate, granted at a nominal rent one pice per beegah as a reward for long service, to the *Dewan* of the family by the father of the infant plaintiffs, who were in existence at the time of the lease, but did not concur in it, is invalid.

The texts of the Mitákshará are too strong to be got over: "Neither the father nor grandfather is master of the whole immovable estate. Immovable property may not be consumed even by the father's indulgence," which passages forbid a gift of immovable property through favor. Chapter I, Section i, page 21.

The decision of the Lower Court is correct, and the appeal must be dismissed with costs.—S. W. Rep. Vol. XI, p. 343.

Held that a sale by a Hindoo of ancestral immovable property, when a legitimate son of the vendor was living, and made without having first obtained the consent of that son, was declared void as being contrary to the Hindoo law.*—Mukoon Misser and another *versus* Kunyah Ojha. Agra S. D. Dec. for 1846 p. 275.—*Vide* Morley's Digest, New series. Vol. I, p. 35.

* This case, which was an appeal from Zillah Goruckpore, where the law of Mithila is prevalent, was decided on the Vyavasthá of the law officer of the Court, and on the view of the law on this point taken by sir W. Macnaghten, viz., "the father is incompetent to give, sell, mortgage, or make any other alienation of his immovables and bipeds, where a legitimate son is living, without his consent." (2 Macn. Princ. H. L. 234.)

CALCUTTA, H. C. A.—*The 12th of May,* 1869.

Present:

The Honorable Sir Barnes Peacock *Kt. Chief Justice,* and the Honorable F. A. Glover, *Judge.*

Case No. 479 of 1869.

HURODOOT NARAIN SINGH, (Plaintiff,) Appellant,

versus

BEER NARAIN SINGH and others, (Defendants,) Respondents.

A Hindoo father has no power to settle ancestral property by conveyance in his life-time or by a will to take effect after his death, without the consent of all his sons living at the time. Where such a settlement is not assented to by the sons living at the time, and another son is afterwards born, no subsequent assent of the former would be binding on the latter.

Peacock C. J.—It appears to me that there was no partition by the father in this case, partition being the adjustment of diverse rights regarding the whole by distributing them on particular portions of the aggregate.—*Mitákshará* on Inheritance, Chap. I, Section i, para 4. This being ancestral estate and governed by the *Mitákshará* Law, the father had no power to settle the property by a conveyance in his life-time or by a will to take effect after his death. Here, there was no adjustment. All that was done was a grant by the father that all the property except Ameera-poora should be divided into two 8 annas' shares, one 8 annas' share to go to the sons then living born of the first wife, and the other to the then existing sons of the second wife. There was no adjustment of the shares of the sons of the respective wives, and no allotments were made to the wives, and no evidence given to show that the wives had separate property. It was not a partition but a settlement by the father, who had no power to make it without the consent of all his sons who were then living. It appears that the father, in addition to the life-estate which was reserved to him in Ameera-poora, reserved to himself a control over the whole property. The effect of this settlement was, as regards a subsequently born son, very different from what the effect of a legal partition would have been; for, if there had been a legal partition, the father would have taken a share, and each of the two wives would have taken a share,*

* **In partition wives are entitled to shares in their husband's self-acquired property. See the Chapter on Partition in Part I.**

and on the death of the father, the plaintiff, as a son born after partition, would have taken the whole of his father's share and the whole of his mother's share, if there were no daughters.—See Section VI of the *Mitákshará*.

There being no evidence that the settlement made by the father was assented to by the sons before the birth of the plaintiff, *the plaintiff's right to his share of the property attached*, and no subsequent assent of the sons to the settlement after the plaintiff's birth would be binding on the plaintiff. But even if assent after the birth of the plaintiff would have been sufficient, nothing appears to have been done from which an assent could be inferred with the exception of the reference to arbitration on the 26th of November 1857. I am of opinion that the plaintiff was not bound by that arrangement, he not being a party to it, and being under age when it was made.

The plaintiff is declared to be entitled as one of the joint heirs of his father to an undivided one-sixth of the estate and to possession thereof. The appellant will recover from the respondent Beer Narain the costs of the appeal in the Lower Appellate Court and the costs of this Appeal.—W. R. Vol. XI, p. 480.

CALCUTTA, H. C. A.—*The 22nd of June*, 1865.

Present:

The Honorable C. Steer and W. Morgan, *Judges*.

Regular Appeal from a decision passed by the Judge of Bhagulpore, dated the 9th of December, 1864.

KANT NARAIN SINGH and others, (Plaintiffs,) Appellants,

versus

PREM LALL PANDEY and others, (Defendants,) Respondents.

A son, who from his birth acquires a vested interest in the ancestral estate, may sue to obtain a declaration that sales by his father without the son's consent are, as against him, void and inoperative to pass or to affect any rights possessed by him in the property; and also that property, still in the father's hands, is ancestral property, and cannot therefore be alienated by the father except under the circumstances recognized by the Mitákshará Law as justifying alienation, and with the consent of those whose consent is, by that Law, requisite.

In such a suit by a son against the father and several purchasers, the mere fact of each of the purchasers being concerned only in a portion of the case does not render the suit open to objection on the ground of multifariousness.

The plaintiff Kishnadhur Singh, a person of full age, has, with his minor brothers, instituted this suit against their father and several other defendants, who have at various times, it is alleged, purchased portions of ancestral property from the father. The object of the suit is to set aside these purchases as illegal, by reason of the sales by the father having been made for causes which do not, according to the Mitákshará Law, which governs this case, enable the father alone to sell.

The plaintiff asks by this plaint to obtain possession of the property sold, and also that a prohibitory order may be made under Section 15 of Act VIII of 1859 in the plaintiff's favor, regarding the property still remaining in his father's possession.

The Judge has dismissed the suit on two grounds :—

1st. That such a suit for possession of ancestral property during the father's life-time cannot be maintained.

2nd. That the Plaintiffs, having a mere contingent right, are not entitled to sue for an order declaring such right.

From this decision the plaintiff now appeals.

The decision of the High Court in the case of Mussummaut Pranputty Coonwur and others (23rd March 1863,) upon which the Judge relies as showing that the plaintiffs are not entitled to a declaratory order, does not govern the present case.

It is there said that a person having a mere contingent right which may never have existence, cannot sue for a declaration of his right under Section 15 of Act VIII of 1859. The plaintiff there, according to the judgment of the Court, sought for a declaration of his own rights before he had acquired any, and further sought to set aside a document which had no legal force or effect, and to restrain the widow from injuring the estate without showing any grounds for the injunction.

The interest of the son here is not a contingent interest. On the birth of a son, he acquires, by the Mitákshará Law, a vested interest in the ancestral estate, and, on attaining his majority, he is even in certain contingencies, permitted by the letter of the law, and according to a decision also (see Stoke's Madras High Court Rep.

page 77,) to call for a partition of the ancestral estate. He possesses, therefore, something more than a mere contingent interest. Whatever may be the precise construction of the Section of the Code of Civil Procedure which has been quoted, we think that there is nothing either in that Section or in any rule of Law to prohibit a son from maintaining a suit for a portion at least of the relief which is sought for here. The plaintiffs appear to us to have a right to ask from the Court that the sales by their father may be declared, if they can establish that by evidence, to be, as against them, void and inoperative to pass or to affect any right possessed by them in the property sold. They may further be entitled to a declaration, respecting the property still in the father's hands, that it is ancestral property, and that it, therefore, cannot be alienated by the father except under the circumstances recognized by the Mitákshará Law as justifying alienation, and with the consent of those whose consent is by that Law requisite.

The suit must be remanded for trial.—W. R. Vol. III, page 102.

Calcutta, S. D. A.—*The* 19*th of June,* 1836.

Motee Lal and Kalian Singh, Appellants,
versus
Mitter-jeet Singh, Seeta Ram and Duljeet Singh, Respondents.

According to the law as current in Behar, the alienation by a Hindoo father of immovable ancestral property without the consent of his sons, except on proof of necessity, is illegal.

The respondents instituted the action, out of which this appeal arose, in the Zillah Court of Ramghur, against the appellants, to recover a fourth or a four anna share of mouzah Doobhee pergunnah Shehurgottee, which they alleged to be their ancestral property. The plaint set forth, that Duriao Singh, the grandfather of the plaintiffs, had two wives, by the first of whom he had a son named Kunhaia Lal, the father of the plaintiffs; and by .the second three sons, *viz.*, Mundul Singh, Ramjeawn Lall, and Mohun Lal. In the

year 1215, Duriao Singh gave to Kunhaia Lal, a portion of his property, among which was included that now sued for, and separated him from the rest of his family, he himself residing with his sons by his second wife. In 1216 Kunhaia Lal died, leaving, as his heirs, his sons the plaintiffs. After this Duriao Singh, without the consent of the plaintiffs, sold the entire four anna share of mouzah Doobhee (which was all that he ever possessed of it) to Motee Lal and Kalian Singh, and thus disposed of the portion of the village which he had already given to their father Kunhaia Lal. On the purchasers attempting to get their names registered in the Collector's office, the plaintiff's protested, but were referred to the civil Court. The share of the village transferred to Kunhaia Lal was just what he would have been entitled to on the death of his father, and the plaintiffs as the representatives of Kunhaia Lal have a further claim to it under the law of inheritance. They accordingly sue to set aside the sale of their portion of the village made by Duriao Singh to the defendants, and to obtain possession thereof. The case was referred to the Zillah Pundit.

The Pundit considering the facts stated in the plaint to have been proved, gave judgment on the 4th February 1825, in favor of the plaintiffs. The pundit's decree was affirmed on appeal to the Zillah Judge.

A special appeal was then admitted by the Provincial Court for the division of Patna, and, on the abolition of that Court, the case was transferred to the Sudder Dewanny Adawlut.

By the Court, present Mr. G. Stockwell:—" It is proved that Bukhtawur Singh died in 1219, and that his estate was not divided among his heirs until 1220: the allegation of the plaintiffs, therefore, that Kunhaia Lal obtained possession in 1215, under a gift from his father Duriao Singh, falls to the ground. It remains to be considered whether a Hindoo, in possession of ancestral real property in Behar, having sons and grandsons, can, without their consent, dispose of it, or any part of it. The opinion of the pundit of this Court is against the legality of such an alienation of ancestral property, unless in special cases of necessity. Considering, therefore, the plaintiffs entitled, under the law of inheritance, to the property for which they sue, I would confirm the decrees of the lower Courts; but with reference to the important point of law involved, send on the case for another voice."

Mr. Robertson:—"It is in the evidence that the plaintiff Mitterjeet Singh protested against the sale of the property now in dispute, at the time that it was sold to the defendants Motee Lal and Kalian Singh by Duriao Singh. The plaintiffs' father protested, when the matter was before the Collector, in connection with the commutation of names in his register. The present suit, however, was instituted in 1231, that is the year after the sale of the last two annas of the village, and thus the plaintiffs appear to have objected all along to the alienation of the property. According to the opinions of the Pundit delivered in the case of Gopaul Chund Pandey and another *versus* Baboo Konwur Singh, page 24, Vol. V. of the Reports,* and in this case, as also in the case of Ram Lal Tewaree, and Ram Tuwukkul Tewaree *versus* the heirs of Chuttur Tewaree, given at page 6, Vol. II. Strange on Hindoo Law, the alienation of ancestral real property by a Hindoo father, without a clear necessity, or the consent of his sons, is illegal according to the Mitákshará and other authorities current in Behar. I concur with Mr. Stockwell." *Judgment accordingly.*

Remarks (by Sir W. Macnaghten):—

The opinion of the Pundit delivered in this case has not been given at length, as it was precisely to the same effect, as those delivered in the cases above cited. The *Vyavasthás* specify that the father cannot alienate immovable ancestral property without the consent of sons; but as the right of representation is admitted as far as the great grandson, the fact of the plaintiffs being the grandsons of Duriao Singh would make no difference in the result. The extent of the father's power over real inherited property is elaborately discussed in the case of Bhuwanee Churn Banhoojea, Appellant (Vol. II, page 202.)—Sel. S. D. A. Rep. Vol. VI, p. 71.

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* Post, p. 59.

CALCUTTA, S. D. A.—*The 3rd of April* 1830.

GOPAUL CHUND PANDEY and BEHARI LAL PANDEY, Appellants,
versus
BABU KUNWUR SINGH, Respondent.

A, made a grant, of part of his inherited real estate in Shahabad, to B. On B's death his grandsons C, and D, (living their father E,) succeeded. F, (his father A, living,) sued C, D, and E, to set aside the grant, as illegal under the Hindoo Law, and to recover the estate granted under an assignment from A. Ruled, that F's suit is barred by the quite possession of B, C, and D, during a term exceeding 12 years.

Pundit of the Sudder Dewany Adawlut, explains gifts illegal under the Hindoo Law. A father may give a small part, of the ancestral estate, for a pious purpose, without the consent of sons.

Mr. Leycester first heard this case, on the 30th of December, 1829. He held as proved, the possession of appellants, during a period, longer than twelve years, under the gift of 21st of Aghan, 1207. Any doubt created by the use of a wrong letter, in the word *hibah*, was obviated by the words '*have given*' in the deed; and so also, was any suspicion as to the enumeration at the foot, obviated by the extract from the Register. Mr. Leycester proposed, therefore, to reverse the decision of the Court of appeal, and confirm that of the Zillah Court: and that under the grant, appellants should recover as *Shikami Taluk-dars*, with mesne profits and costs.

Mr. Turnbull, the next Judge, who sat on the case (on the 21st of January 1830,) deemed it necessary to refer to the Pundit of the Court, this question, for solution under the Hindoo Law current in Shahabad. " A, gave some ancestral land to B, a *Brahmin.* On his death B's heirs succeeded and held. One of A's sons, in his lifetime, now challenges the legality of the gift. Is it or not valid?"

To this question, the Pundit Voidya Nauth Misra delivered an elaborate reply: its substance was this: "Father and sons had equal property in ancestral lands. Hence, there was that community, which rendered the assent of the sons to the father's alienation indispensable. The gift then, was valid or otherwise, according as such essential, existed, or not. According to texts of the Saint Nárada, cited in the Mitákshará and other works, a gift made, under the influence of fear, as a bribe, and in fourteen other categories, was void. The assent even of the sons could not legalize such gifts.

On the other hand, according to the texts of Kátyáyana and another Saint [Vyása was meant], which are cited in the same books, the gift of a small portion of land, for the sake of piety, even without the assent of sons, was valid; and the king is enjoined, to compel a son, to surrender any inconsiderable property, which his deceased father, (whether sound or sick,) may have given, or promised, for a spiritual object. The Pundit thus illustrated these pious gifts. 1st. A present for performing indispensable rites in honour of ancestors. 2nd. A present to Priests officiating at sacrifices and the like. 3rd. Pious and reverential gifts to Bhahmins,—as *Brahmotra, Krishnárpana, Padárgha,*—in satisfaction of a vow,—as *Vritti* or aliment,—also gifts from affection towards Vishnu and other divinities. The Pundit declared his opinion to conform with the *Mitákshará, Víramitrodaya, Vyavahára Mádhava,* and *Vyavahára Koustubha,* works current in Shahabad.

Mr. Turnbull agreed with Mr. Leycester, that Appellants had held more than twelve years, and in this, Mr. Ross concurred. He also concurred with Mr. Leycester, that the claim of Respondent was barred by prescription. Mr. Ross accordingly, made final the judgment proposed by Mr. Leycester; whereby, the decree of the Court of Appeal was reversed,—the claim of respondent dismissed,—and the estate, to Appellants, as Shikami Talukdars, at rent of 755 rupees, awarded with profits and costs.—Sel. S. D. A. Rep. Vol. V. p. 24.

CALCUTTA, S. D. A.—*The 24th of April* 1858.

Present:

H. T. Raikes, Esq., A. Sconce, Esq., and
J. S. Torrens Esq., *Judges.*

Regular Appeal from a decision of J. J. Ward, Judge of Cuttack, dated the second of April 1859, *affirming a decree of Baboo Tara Caunt Vidyasagur, Principal Sudder Ameen of that District.*

DAMOODUR MOHAPATTUR, (Plaintiff,) Appellant,
versus
BIRJO MOHAPATTUR and others, (Defendants,)
Respondents.

This suit was instituted to declare a mortgage invalid on the ground that, by the law of Mitákshará, the consent of the heir was essential to the transaction, and had not been signified.

Judgment.—

It would appear from the Judge's decision that he held it proved that the first mortgage had been created for the purpose of paying off Government revenue, but this finding is not sufficient to dispose of the whole matter involved in the issue before him.

It may be shown that the ostensible purpose of the loan was to pay off Government Revenue, but to render such a loan binding upon those who had reversionary interests in the property, it must also be satisfactorily proved that such loan was at the time absolutely necessary from failure of the resources of the estate itself, and was not raised through the caprice or extravagance of the proprietor. This point has not been determined by the Judge; we therefore remand the case for a proper decision thereon.—S. D. A. Dec. for 1858, p. 802.

CALCUTTA, S. D. A.—*The 30th of March* 1859.

Present:

H. T. Raikes and J. H. Patton, Esqrs., *Judges* and
G. Loch, Esq., *Officiating Judge.*

Case No. 326 of 1858.

SHEO-SUHAYE SINGH and others, (Plaintiffs,) Appellants,

versus

GOBIND ROY and others, (Defendants,)
Respondents.

By the Mitákshará law, alienation without consent of heirs being unlawful but under necessity, a transfer by mortgage, made to clear off old debts and pay for a marriage was held to have been made under sufficient urgent cause.

This case was admitted to special appeal on the 14th of May 1858.

Judgment.—

We have been shown by the pleader of the respondent, the creditor, that this suit was brought by the sons, on the assumption that the father and uncles of the plaintiffs had raised money by mortgaging the family property, and squandered the proceeds in pleasure and debauchery, by which means the estate now claimed had passed into the hands of the creditor. In reply to this, the creditor shows that the mortgage, by foreclosure of which he now holds the estate, was given by the father and uncles of the plaintiffs, to clear off two other previous mortgages, the time of which had been out, and subjected the mortgagors to the loss of the estate if foreclosed, and that the money thus advanced was also expended in the marriage expenses of a daughter.

These facts were established to the satisfaction of the Courts below, and, in the opinion of those Courts, constituted such necessities as legalised the alienation without consent of heirs under the Mitákshará law.

The point raised in special appeal is the insufficiency of the causes stated to create such necessity as the Mitákshará law recognises.

With the finding of the lower Court before us, that the causes stated do amount to the necessity required, we are only required to regard those causes as they appear on the record.

Doubtless, the encumbrance already burthening the property, when the present mortgage was executed, would have eventually necessitated a sale; and, therefore, they were *primâ facie* a necessity within the law. Considering, then, that the record does contain sufficient proof to justify the finding of the Courts below regarding the existence of such necessity as justified the sale, we see no reason to interfere with the judgment, and dismiss this appeal.—S. D. A. Dec. for 1859, p. 376.

CALCUTTA, S. D. A.—*The 8th of June* 1861.

Present:

C. B. Trevor, G. Lock, and C. Steer Esqrs., *Judges.*

Case No. 348 of 1858.

MUSST. JUNNUK KISSOREE KOONWUR, sister and guardian of BABOO KISSEN-KISSORE NARAIN SINGH, minor, (Plaintiff,) Appellant,

versus

BABOO RUGHOO-NUNDUN SINGH and others, (Defendants,) Respondents.

Held, that under the law of Mithila as well as of the Mitákshará, a father is only joint owner with his sons of ancestral estate, and can only exercise the power of alienation in the case of a minor son existing at the time, under circumstances of legal necessity. Held also, that the debts contracted by plaintiff's father are not shewn to be of *such a nature* as to absolve the son from the obligation to pay them.

Held further that, with the exception of five of the sales made in execution of decrees of Court, all the remaining sales for the reversal of which the present suit is brought were not made under circumstances showing any legal necessity for them, and they are consequently invalid under Hindoo law. Case decided accordingly: both parties under circumstances to bear their own costs.

Suit laid at Co's. Rs. 97,500-6-8.

Messrs. C. B. Trevor and G. Lock.—Musst. Brij Koonwur, paternal grandmother, and after her demise Musst. Junnuck Kissoree Koonwur, sister and guardian of Kissen-kissore Narain, plaintiff,

sues Bhugwut-narain Singh, 1st party, Ram-narain Singh and Rugghoo-nundun Singh and Hurpurkash Narain Singh and others, 2nd party, and various others, for the cancelment of certain deeds of sale illegally made and without warrant of law.

Plaintiff alleges that Mohesh Jha and Omur Jha were the ancestors of the different parties before the Court, and brothers and sons of Bhugruthia Jha, the common ancestor. That both of them had amassed large property whilst living together; that Mohesh Jha had an only son, named Hurdeo-narain Jha, who died childless; that Omur Jha had one son, Kebul-kissore, who succeeded to the whole estate; that Kebul-kissore had three sons, Mohendur-narain, Ram-narain and Lutchmee-narain. Mohendur-narain had two sons, Bhugwut-narain, the father of plaintiff, and Ramanoograh Singh. That Ram-narain had two sons, Rughoo-nundun and Hur-purkash, defendants in this case; and Lutchmee-narain had a son, Bishen-purkash, defendant; that the three brothers lived together till 1238; that in 1239 or 1832 Lutchmee-narain separated himself from his brothers, and they divided all the property into three parts, and each took his share; that both Mohendur-narain and Ram-narain still lived in commensality. That in 1241 or 1834, Mohendur-narain died leaving his eldest son of age and his youngest a minor; that after his death in Assar 1242, Bhugwut-narain separated himself from Ram-narain Singh and retained possession of one-third share of the property, partly on his own account and partly as guardian of his minor brother, Ramanoograh Singh; that before the separation of Baboo Ram-narain Singh there were lacs of Rupees and other articles left by his grandfather and father, which were divided between Baboos Ram-narain Singh and Bhugwut-narain Singh, according to the former deed of partition; that after the separation, Bhugwut-narain, on account of there being no one to take care of him, began to live extravagantly; that on Ramanoograh arriving at his majority, and seeing Bhugwut-narain Singh living extravagantly, he separated himself from him in 1249, and held possession of his one-sixth share, and Bhugwut-narain held his one-sixth share of the ancestral property; that at the time of the death of Mohendur-narain no debts were due from any one, but he left much cash and other valuables, and had an estate also bringing in a large income, and the share accruing to plaintiff brought in at least a net income of 30,000 Rupees; that

on Bhugwut-narain becoming extravagant, it was good opportunity for Ram-narain Singh, defendant, and other defendants, to entangle him in difficulties and take his property; that for small sums of money they instigated and caused him to execute bonds for large amounts in the name of other individuals; that when these nominal Mohajuns obtained their decrees, they themselves began to purchase them; that again they instigated Bhugwut-narain to execute other bonds in their own names, lending him small sums of money, but not giving him any account of the same, and then caused him to execute bonds for double, treble, four and five times the amount of the sums actually paid to him and obtained decrees on the same; that they also instigated other creditors to sue and obtain decrees for false debts; that then many Mouzahs were brought to sale and fourteen villages were sold on different dates and years, of which 9 villages of large value were purchased by Ram-narain, Rughoo-nundun Singh and others, second party defendants, one by Bishen-purkash Singh in the name of Nursing Thakoor, his own servant, and four by the other defendants as is given in schedule below; that, moreover, they caused the said Bhugwut-narain to execute many Deeds of Sale for many villages of large values inserting large sums of money in them, some in the names of the defendants of the second party, and some in the fictitious names of their servants; that, in short, between 1257 and 1261 all the ancestral and paternal property of plaintiff's father was dissipated; that to strengthen their fraud and to screen their evil acts, they have prepared a deed of gift (Ata-namah) of five villages in plaintiff's favor, alleging that it was executed in his (plaintiff's) favor by his father at the ceremonies performed shortly after his birth, and have registered it, hoping thereby that the claim of plaintiff to his ancestral estate by the reversal of the deeds of sale would not be made. That the present suit is instituted consequently to establish the reversionary right of the minor plaintiff to the property alleged to have been sold to the defendants by the reversal of the Deeds of Sale, as having been made by the minor's father contrary to the law of Mithila, without any necessity, but merely to satisfy his present extravagancies, and by the cancelment of the alleged Deed of Gift to himself.

From the decision of the Principal Sudder Ameen, adverse to him, an appeal has now been preferred to this Court by the plaintiff below. He, in his Appeal-petition, calling in question the law of Mithila, as laid down by the Principal Sudder Ameen, submits that as to the power of alienation by a father with a minor son living, it is identical with the law of the Mitákshará, and that that power can only be exercised within certain limitations, and under certain circumstances not present in the case before the court, and that, moreover, in the present case, the purposes of the sales were of an immoral nature not sanctioned by Hindoo Law, that consequently the decree of the Principal Sudder Ameen should be reversed, except as to the reversal of the Deed of Gift to plaintiff and the sale of the dwelling houses.

The issues raised on the pleadings in the suit are :—

1st. Has a father, under the law of Mithila which prevails in Tirhoot, an absolute power to dispose of an ancestral property as he pleases, notwithstanding that a son is living, or is only a joint-owner with his sons, and, therefore, with a power of alienation to be exercised, in the case of a son who has reached his majority, only with his consent, and in the case of minor sons, as in this suit, only on a legal necessity arising ?

2nd. If he has only a restricted power, were the debts for which the alienations took place of such a nature as under Hindoo law, to render the property in which the sons have a vested interest under no circumstances liable ?

3rd. If not of such a nature, was there any such real or apparent necessity for the sale as justified the vendor in selling, and the vendees in purchasing, property not absolutely the property of the seller, but held by him, partly as his own and partly as trustee for his minor son ?

In cases to which the reports of this Court do not furnish any authority, we are compelled to resort to *Vyavasthás* of learned Pundits, and it may be in some cases to evidence of local custom, but if the reports of the court furnish us with no authority, and also the reasoning, upon which the rule laid down conclusively, is based, we prefer being guided by it, and to leave less weighty authorities; at the same time we lament with the government pleader, that the

chief authorities in Mithila law have not been rendered available, by being translated into English, to Judges unlearned in the Sanscrit language, and that we are thus, many of us at least, unable from our own scrutiny of the text to ascertain and vouch for the accuracy of the law as laid down by our predecessors in the court; in the present instance, however, such scrutiny is the less necessary, as the case on which we intend to reply, was decided by that great authority in Hindoo Law, Mr. Colebrooke, and also by Mr. Fombelle, and had the *Vyavasthás* on which that judgment was founded been incorrect, they, subject as they were, to the scrutiny of a profound Sanscrit scholar, would undoubtedly not have been adopted.

In the case of Sham Singh *versus* Musst. Umraotee,* which is a Tirhoot case, governed by the law of Mithila, the Pundit's *Vyavasthà* accepted by the court was to the effect that "if a Hindoo possessing immovable ancestral property, some time previous to his death, expresses himself in talking of his eldest son, to the effect that 'you will become sole proprietor on my death, and my younger son will be provided by you with a suitable maintenance,' the gift cannot take place from the omission of the word *dán* (donation) in the expression, which, both according to the shasters and the current practice of the country, is essential to complete the gift; further, supposing the *dán* (donation) to have been expressed in the above sentence, still the gift cannot be considered valid, because *a father and son possess an equal right in ancestral immovable property*, consequently the younger brother's right is established, and the estate becomes joint property, the gift of which is illegal, and a verbal gift, under any circumstances, of immovable property, unless supported by a hebba-namah, is invalid." The authorities, agreeably to which the *Vyavasthá* has been delivered, are the Vivâda Ratnâkara, the Smriti Shamuchchaya, Vivâda Chandra, Vivâda Chintâmani and other works current in Mithila.

Now it will be observed, that the particular case cited referred to gifts of the whole property, whereas in the present case we have only the sale of a portion, but notwithstanding this difference, the principle upon which the doctrine, as to the former set of circumstances, is founded, applies to the latter, and the illegality of both

* Vol. II., page 74, Select Reports of Sudder Dewany Adawlut. Ante. p. 44.

is based upon the fact that the father and the son in Mithila, as in the countries governed by the Mitáksharâ, possess an equal right in ancestral immovable property.*

This principle of ancient Hindoo law appears, according to the precedents of this Court above cited, to exist in the books of Mithila as well as the Mitáksharâ.

On the ground then of the fundamental principle of general Hindoo law, the principle of co-ownership of father and son, and the precedent of this Court above cited establishing it, we have no hesitation on the first issue in the present case of finding that under the law of Mithila, a father is joint owner with his sons of his ancestral estate, and can only exercise the power of alienation in the case of a minor son existing at the time, as in the present instance, under circumstances of legal necessity.

It has been attempted to be shown us by the evidence of witnesses that the extravagances of the father of the minor, Bhugwutnarain Ram, were of the nature of dissipations, for which under Hindoo law, as being repugnant to good morals, the son would under no circumstances be liable; that, therefore, on this ground the sale of the property in which the son has a vested interest is illegal; but we are not satisfied with evidence of this nature; all dissipation tends to extravagance, but all extravagances are not caused by dissipation repugnant to good morals in the Hindoo sense of the term, and nothing but the strongest and most reliable evidence as to the particular nature of dissipation of the debtor, would justify our giving a verdict on the second issue in plaintiff's favor, and as no evidence of that kind is before us, we find for the defendant upon it.

We proceed to the consideration of the third issue. On the part of the plaintiff, it is contended that on the plaintiff's grandfather's death, no debts were due by him, but he died worth large

* "Ancient law including Hindoo law," as has been well remarked by a learned writer, "knows next to nothing of individuals, it is concerned not with individuals but with families; not with single human beings, but with groups; the mature Roman law, and modern jurisprudence following in its wake, looks upon co-ownership as an exceptional and momentary condition of the right of property, but in India, this order of ideas is reversed. There as soon as a son is born, he acquires a vested interest in his father's substance and on attaining years of discretion he is even, in certain contingencies permitted by the letter of the law to call for a partition of the family estate; co-ownership in fact is there the rule, and it may be conjectured that private property in the shape we know it, *viz.*, as that of individual, was chiefly formed by the gradual disentanglement of the separate rights of individuals from the blended rights of a community or family."

estates and possessed of considerable ready money; that the yearly income of the plaintiff amounted to 30,000 Rupees, a sum quite sufficient for all his wants; that, moreover, there were no great ceremonies in the family requiring large expenditure, and in point of fact, the family expenditure amounted to not more than 5 or 6,000 Rs. annually; that the sales for the reversal of which the present suit is brought, were made without legal necessity, merely to raise money to enable the seller to indulge in an extravagant mode of living, or to satisfy bonds for which small considerations had been given and decrees upon those bonds. The property sold being of a value far beyond the amount of the decrees; that granting even if plaintiff is unable to displace the sales which have taken place in execution of judicial decrees on the only ground on which a displacement would be legitimate, *viz.*, the immoral purpose of the loan patent on the face of the decrees, still the other sales are liable to reversal as being made without any necessity, and not only were they made on the part of the vendor without any legal necessity under Hindoo law, but they have been purchased on the part of the purchaser without that enquiry and caution with a view to seeing that no breach of trust was committed, which a party, dealing with a person in the position of the plaintiff, a party a trusty with the restricted right of sale, should have used,* that considering the position of the father and that of the person purchasing, relations in most instances to each other, the latter, therefore, cognizant of all the circumstances of the family, it was incumbent on them as laid down by the Privy Council in the case of Hunooman Persaud Pandey *versus* Musst. Babooee Munraj Koonwaree, to prove the facts, presumably better known to him than to the infant heir, *viz.*, those facts embodying the representation made to them of the alleged receipt of the sale of estates, and of the motives which induced the purchaser, but nothing of this sort have the defendants attempted to prove. That consequently with the exception of the sale made in the execution of decrees, all the sales should be reversed as having been made without authority under Hindoo law.

The sales for the reversal of which the present suit is brought, divide themselves into three classes, 1st, sales made by order of court

* Stronghill v. Austey De Gex. Macnaghten and Gordon, Vol. I., page 635.

in execution of decrees, 2nd, sales made privately to satisfy decrees and bonds, and 3rd, sales made simply in order to raise money for some purpose or other. Freedom on the part of the son as far as regards ancestral property from the obligation to discharge the father's debts under Hindoo law, can be successfully pleaded only by a consideration of the invalid *nature* of the debts incurred. Now we are clearly of opinion, that the plaintiff has been unable to show that the expenses for which those decrees were passed, were, looking to the decrees themselves, and we cannot now look beyond these, immoral, and such as under Hindoo law the son would not be liable for; we must, therefore, decline to interfere with the 5 sales, Nos. 25, 26, 27, 28 and 29, which have taken place by the intervention of the courts for debts, which, though caused by extravagance, were such as a son would be liable for. The remaining sales fall under other two classes; under the 2nd class of sales made to satisfy decrees and bond-debts fall Nos. 3-4-14-16-18-22, and under the third class fall the remaining sales, Nos. 1-2-5-6-7-8-9-10-11-12-13-15-17-19-20-21-23-24. Now in sales made without the intervention of a Court of Justice when the vendor is a trustee for others as well as part owner; and the purchaser a stranger, such purchaser is, as contended for by the learned Advocate General, under an obligation to enquire and see that no breach of trust is, by the act of sale, to him committed, when, moreover, the purchaser is not a stranger, but a person knowing not only the position of the vendor, but the circumstances of the family, the obligation is stronger upon them of making such enquiry, and if the transaction, of whatever nature it may be, be afterwards called in question, the *onus* is clearly upon him of showing what those facts were which were represented to him, as raising the necessity, which was sufficient to justify it in his mind under the law applicable to the case.

After an attentive analysis of all the evidence placed before us by the defendants, we are unable to say, that any such proof of a satisfactory nature has been placed before us by them in this case, but the doctrine has been openly adopted by them that the sales themselves prove their own necessity; we think that this doctrine is altogether an erroneous one, and that on the simple failure by them to prove that they had made any enquiry as to the legal necessity of the sales in either class of cases under consideration,

this case might at once be decided against them; but on referring to the evidence of the plaintiff, the nature of all these transactions at once becomes apparent, and also the fact, that they were all without exception entered into without any legal necessity, considerable sums in the aggregate were paid over to the debtor, for which bonds to a large amount were given and decrees have been obtained on those bonds, and the transaction seems to have been part of a system entered into by certain parties, including the principal defendant, to ease plaintiff's father of his ancestral property by supplying his extravagances. The existence of a bond debt or a decree founded on, is neither of them, as a general rule, sufficient to warrant a private sale of property partly held in trust beyond the amount of the decree or bond debt without the intervention of the court, and it follows *a fortiori*, that where there are neither decrees nor bond debts, the sale of trust property at all can, under no circumstances, except those of strict legal necessity, be upheld by the court.

Under this view of the case, we confirm the order of the lower court, reversing the sale of the dwelling houses by plaintiff's father, and also the Deed of Gift of the five villages alleged to have been made in his favor by his father also, and we declare, reversing the decision of the Principal Sudder Ameen, that as far as concerns the rights in reversion of the minor plaintiff before us, the sales from Nos. 1 to 24 inclusive are null and void: as the plaintiff's father is still alive, plaintiff is not entitled to possession and will remain for the parties interested to determine amongst themselves, whether the transaction entered into shall stand good for the life-time of Bhugwutnarian, but with that determination the court has at present no concern.

The court also dismiss so much of the plaintiff's claim as refers to the sale of the five properties, 25 to 29, made in execution of decrees of court.

Under the special circumstances of the case each party will bear his own costs.

Mr. *C. Steer.*—I concur in the view taken by my colleagues in this case.—S. D. A. Dec. for 1861, p. 213.

PRIVY COUNCIL.—*The* 12*th May* 1874.

Present:

Sir James W. Colvile, Sir Barnes Peacock,
Sir Montague, E. Smith, Sir Robert P. Collier, and
Sir Lawrence Peel.

*On appeal from the High Court of Judicature at Fort William in Bengal.**

GIRDHAREE LALL and another, *versus* KANTOO LALL and others;
and
MUDDUN THAKOOR, *versus* KANTOO LALL, and others.

Ancestral property which descends to a father under the Mitákshará law, is not exempted from liability to pay his debts because a son is born to him, unless the debt is illegal or has been contracted for an immoral purpose, in which case the son may not be under any pious obligation to pay it.

A purchaser of joint ancestral property under an execution is not bound to go back beyond the decree to ascertain whether the Court was right in giving the decree, or, having given it, in putting up the property for sale in execution.

This is a suit brought by Baboo Kantoo Lall, the son of Bhikharee Lall, and by Mussamut Doolaro Koonwaree, on behalf of Mahabeer Pershad, the minor son of Lalla Bujrung Sahye, the said Kantoo Lall and Mahabeer Pershad being grandsons of Moonshee Kunhya Lall, deceased, against a number of different defendants, who are wholly unconnected with each other, to recover possession from them of certain portions of land which belonged to the ancestral estate, also to set aside the Deed of Sale executed by the two fathers, and to recover possession of the whole property,—not the particular shares of the sons, even if the sons could be said in a case like the present to have had distinct and separate shares. The Principal Sudder Ameen dismissed the suit. The High Court set aside that decision and awarded to the plaintiff Kantoo Lall one-half of his father's share, that is, one-half of an 8 anna share; but as to the other plaintiff, Mahabeer Pershad, the minor son of Bujrung Sahye, they held that he was not entitled

* From the judgment of Kemp and E. Jackson, JJ., in regular Appeals No. 114 of 1867 and No. 44 of 1869, decided 16th April 1868,—9 W. R., 469.

to recover, inasmuch as he was not born at the time when the deed of sale was executed. In respect of that portion of the decision no appeal has been preferred.

The property is situated in the *Mithilá* district, and is governed by the *Mithilá* law, which is very similar to the law administered under the Mitákshará. With reference to the Mitákshará upon this point, it may be well to read from the 11th Moore's Privy Council cases, p. 89, a portion of the judgment which was delivered by Lord Westbury in the case of Approvier *v.* Rama Ŝubba Aiyan* before the Judicial Committee. He says :—"According to the true notion of an undivided family in Hindoo law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property that he, that particular member, has a certain definite share. No individual member of an undivided family could go to the place of the receipt of rent, and claim to take from the collector or receiver of the rents a certain definite share. The proceeds of undivided property must be brought, according to the theory of an undivided family, to the common chest or purse, and then dealt with according to the modes of enjoyment of the members of an undivided family. But when the members of an undivided family agree among themselves, with regard to a particular property, that it shall thenceforth be the subject of ownership in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject-matter so agreed to be dealt with; and in the estate each member has thenceforth a definite and certain share, which he may claim the right to receive and to enjoy in severalty, although the property itself has not been actually severed and divided."

It is probable that on account of this case, and on account of a decision in the High Court, 12 Weekly Reporter, Full Bench cases, p. 5, this suit was brought, by Kantoo Lall and Mahabeer Persad, not for the purpose of recovering their respective shares, because they had no distinct or definite shares to recover, but to recover the whole property upon the ground that the sale by the fathers was void, and that the whole property which the fathers had conveyed ought to be brought back again to be joint property

* Sutherland's Privy Council judgments, page 657.

for the benefit of the whole family. It is questionable whether a son can, under the Mitákshará law, recover an undivided share of ancestral property sold by his father (12 Weekly Reporter, Civil Rulings, 478). But it is unnecessary to determine that question in the present case, because their Lordships are of opinion that, looking to the circumstances of this case, the plaintiff was not entitled to recover any portion of the estate as regards the first two defendants.

It appears that the deed of sale was executed on the 28th July 1856. At that time a decree had been obtained against Bhikharee Lall at the suit of Byjnath Chuckerbutty, upon a bond executed by Bhikharee in his favor, and an execution had issued against him, upon which his "right and share" in the dwelling-house belonging to the family had been attached. It was therefore necessary to raise money to pay the debt of Bhikharee Lall, the father, and to get rid of the execution, whatever the effect of it might be.

The property descended from Kunhya Lall, who died in the year 1250. The eldest of the two plaintiffs, Kantoo Lall was not born until 1251. So that upon the death of Kunhya Lall, the property descended to Bhikharee Lall and Bujrung Sahye as his two sons, and they were the only persons interested in the property at that time. There can be no doubt that if they had contracted a debt at that time, the property which descended to them from their ancestor would have been liable to pay it. But it is said that they could not sell the property, because in 1251, before the deed of sale was executed, Kantoo Lall was born, and, by reason of his birth, under the *Mithilá* law, he had acquired an interest in this property.

Now it is important to consider what was the interest which Kantoo Lall acquired. Did he gain such an interest in this property as prevented it from being liable to pay a debt which his father had contracted? If his father had died and had left him as his heir, and the property had come into his hands, could he have said that because this was ancestral property which descended to his father from his grandfather, it was not liable at all to pay his father's debts? In the case, which has been referred to in argument, of Hunooman Persaud Panday *v.* Mussamut Babooee

Munraj Koonwaree (6 Moore's Indian Appeal Cases), Lord Justice Knight Bruce, who delivered the judgment of the Privy Council, says at page 421:—"Though an estate be ancestral, it may be charged for some purposes against the heir for the father's debt by the father, unless the debt was of such a nature that it was not the duty of the son to pay it; the discharge of it, even though it affected ancestral estate, would still be an act of pious duty in the son. By the Hindoo law, the freedom of the son from the obligation to discharge the father's debt has respect to the nature of the debt and not to the nature of the estate, whether ancestral or acquired by the creator of the debt." That is an authority to show that ancestral property which descends to a father under the Mitákshará law is not exempted from liability to pay his debts because a son is born to him. It would be a pious duty, on the part of the son to pay his father's debts, and it being the pious duty of the son to pay his father's debts, the ancestral property, in which the son as the son of his father acquires an interest by birth, is liable to the father's debts. The rule is, as stated by Lord Justice Knight Bruce:—"The freedom of the son from the obligation to discharge the father's debt has respect to the nature of the debt and not to the nature of the estate, whether ancestral or acquired by the creator of the debt."

It is necessary, therefore, to see what was the nature of the debt for the payment of which it was necessary to raise money by the sale of the property in question. If the debt of the father had been contracted for an immoral purpose, the son might not be under any pious obligation to pay it; and he might possibly object to those estates which had come to the father as ancestral property being made liable to the debt. That was not the case here. It was not shown that the bond upon which the decree was obtained was given for an immoral purpose; it was a bond given apparently for an advance of money, upon which an action was brought. The bond had been substantiated in a Court of Justice; there was nothing to show that it was given for an immoral purpose; and the holder recovered a decree upon it. There is no suggestion either that the bond or the decree was obtained be-namee for the benefit of the father, or merely for the purpose of enabling the father to sell the family property and raise money for his own purpose. There is nothing of the sort suggested, and nothing proved. On the con-

trary, it was proved that the purchase money for the estate was paid into the bankers of the fathers, and credit was given to them with the bankers for the amount, and that the money was applied partly to pay off the decree, partly to pay off a balance which was due from the fathers to the bankers, and partly to pay Government revenue; and then there was some small portion of which the application was not accounted for. But it is not because there was a small portion which was not accounted for, that the son has a right to turn out the *bonâ fide* purchaser who gave value for the estate, and to recover possession of it with mesne profits. This he is endeavouring to do after the purchaser has been in possession for a period of ten years; for the purchase was completed in 1856, and the suit was not brought until 1866, when the son says that the right of action accrued to him upon his attaining his majority. Even if there was no necessity to raise the whole purchase-money the sale would not be wholly void.

It appears, therefore, to their Lordships that the plaintiffs are not entitled to set aside the deed of sale; that the judgment of the Principal Sudder Ameen with regard to it was correct; and that the High Court were mistaken in upsetting that decision, and awarding to the plaintiff one-fourth of the estate, as being one-half of the share of his father.

In addition to the case in the Privy Council, there is a case in the Sudder Court of *Mussammat Junnuk Kishoree Koonwar* v. *Rughoo-nundun Sing,* reported in the Bengal Sudder decisions of 1861; in which it was held that it was necessary for the son, in order to set aside the sale of property for the purpose of paying the father's debts, to show that the debt was illegal or contracted for an immoral purpose. The passage is at page 222. It is there said:—"The sales for the reversal of which the present suit is brought divide themselves into three classes: first, sales made by order of Court in execution of decrees; second, sales made privately to satisfy decrees and bonds; and third, sales made simply in order to raise money for some purpose or another. Freedom on the part of the son, as far as regards ancestral property, from the obligation to discharge the father's debts under Hindoo law can be successfully pleaded only by a consideration of the invalid nature of the debts incurred. Now we are clearly of opinion that the plaintiff has

been unable to show that the expenses for which those decrees were passed were, looking to the decrees themselves (and we cannot now look beyond these), immoral, and such as under Hindoo law the son would not be liable for."

It appears, therefore, to their Lordships that the plaintiff certainly is not entitled to set aside this deed, and if he were so entitled, it is very doubtful whether he has only a particular share in this property of which he is entitled to recover possession. It is unnecessary, however, for their Lordships to decide anything with regard to that point, inasmuch as they hold that the plaintiff is not entitled to set aside the deed of sale.

The second appeal is by Muddun Mohun Thakoor. He is the fourth defendant in the suit which was brought against him to recover possession of 5-anna share in mouzahs Rajpore and Alli-nuggur, &c. It appears that Muddun Mohun Thakoor purchased at a sale under an execution of a decree against the two fathers. He found that a suit had been brought against the two fathers; that a Court of Justice had given a decree against them in favor of a creditor; that the Court had given an order for this particular property to be put up for sale under the execution; and therefore it appears to their Lordships that he was perfectly justified, within the principle of the case which has already been referred to, in 6th Moore's Indian Appeal cases, in purchasing the property, and paying the purchase-money *boná fide* for the purchase of the estate. At page 423 of the report, Lord Justice Knight Bruce says:—"The power of the manager for an infant heir to charge an estate not his own is under the Hindoo law a limited and qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate. But where in the particular instance the charge is one that a prudent owner would make in order to benefit the estate, the *boná fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it in the particular instance, is the thing to be regarded. But, of course, if that danger arises, or has arisen, from any misconduct to which the lender is or has been a party, he cannot take advantage of his own wrong to support a charge in his own favor against the heir, grounded on a necessity which his wrong has helped to cause." The same

rule has been applied in the case of a purchaser of joint ancestral property. A purchaser under an execution is surely not bound to go back beyond the decree to ascertain whether the Court was right in giving the decree, or, having given it, in putting up the property for sale under an execution upon it. It has already been shown that if the decree was a proper one, the interest of the sons, as well as the interest of the fathers, in the property, although it was ancestral, were liable for the payment of the father's debts. The purchaser under that execution, it appears to their Lordships, was not bound to go further back than to see that there was a decree against those two gentlemen; that the property was properly liable to satisfy the decree, if the decree had been given properly against them; and having inquired into that, and having *bonâ fide* purchased the estate under the execution, and *bonâ fide* paid a valuable consideration for the property, the plaintiffs are not entitled to come in and to set aside all that has been done under the decree and execution, and recover back the estate from the defendants. It appears to their Lordships, therefore, that the decision of the Principal Sudder Ameen as regards this portion of the case was also correct.

Under these circumstances their Lordships will humbly recommend Her Majesty that the judgment of the High Court, so far as it relates to the two portions of the estates purchased by the appellants in these two appeals, respectively be reversed, and that the decision of the Principal Sudder Ameen with regard to them be affirmed, and that the respondents do pay to the appellants respectively their costs in the High Court, and their costs of these appeals.—S. W. R. Vol. XXII, P. C. p. 56.

Assuming that an alienation by a father who at the time of such alienation was a member of a Hindoo family living in commensality, may be questioned by a son, it will have to be seen whether the alienation was made for purposes which justifies it.—*Noor Ahmud* v. *Lulla Persad.*—N. W. Rep. Vol. II, p. 189.

Mere production of decree will not establish the propriety and necessity of a sale of ancestral property. There should be evidence of the nature of the debts on which such decrees originated.—*Reotee Singh* v. *Ramjeet,—Ibid.*, p. 50.

To justify alienation of ancestral property, a legal necessity for the sale must be strictly proved to have existed, and such necessity cannot be inferred from the habits and general character of the vendor.—*Mitra-jit Singh* and others, v. *Raghu-bansi Singh* and others.—B. L. Rep. Vol. VIII, Ap. p. 5.

Where the Court has expressly found the existence of debts and that the sale of ancestral property was a *boná fide* one, the circumstance that there was no actual pressure at the time in the shape of suits by the creditors for the recovery of their debts, is not of itself sufficient to invalidate the alienation.

A sale of ancestral property merely for the purpose of procuring funds for the purchase of other property formerly belonging to the family, cannot of itself be considered a sale for any of the necessary purposes sanctioned by law.—*Kaihur Singh* and others v. *Roop Singh* and others.—N. W. Rep. Vol. III, p. 4.

A mortgagee acquiring by operation of law the possession of an estate mortgaged by a Hindoo father, without the son's consent, is bound to inquire whether the debt, on account of which the mortgage is given, is legally a necessary one or not; otherwise it will not avail him that the Court has, on his application, declared the mortgage foreclosed, or conditional sale rendered absolute.—*Purmanund* v. *Mussummat Orumba Koer.*—S. W. Rep. for 1864, p. 143.

Where ancestral property is to be sold or mortgaged, all that a purchaser (or mortgagee) has to do is to see that there is sufficient pressure upon the estate to render the transfer necessary. The fact of there being a decree, an attachment, and proclamation for sale is sufficient pressure.—*Sooruj Koer* v. *Nuckchedee Laul.*—S. W. Rep. Vol. IV, C. R. p. 72.

Where a mortgage had been effected by a Hindoo father in a district governed by the Mitákshará law, for the purpose of saving the estate from sale for arrears of revenue, held, on the precedent of the case of Hunooman Persad Panday, Privy Council Reports, Vol. VI, p. 393, that, as the mortgagee appeared to have acted in good faith and had lent the money to prevent a former mortgage from being foreclosed, his mortgage was a good and valid one. It is a mistake to suppose that the *dicta* in the case of Hunooman

Persad Panday only apply to alienations effected by guardians of minors. They lay down the general principles by which the courts are to be guided in dealing with suits in which it is sought to set aside alienations made by persons having a limited or qualified power over the estates they have alienated.

These are that the power of alienating can only be exercised rightly in case of need, or for the benefit of the estate, but where the charge is one that a prudent owner would make in order to benefit the estate, the *bonâ fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it in the particular instance, is the thing to be regarded. If the lender inquires into the necessity for the loan and acts honestly, satisfying himself that the manager is acting in the particular instance for the benefit of the estate, the real existence of a sufficient necessity is not a condition precedent to the validity of his charge on the estate, nor is he bound to see to the application of the money. *Deotaree Mohapattur* and others v. *Damoodur Mohapattur* and others.*—S. D. A. Rep. for 1859, p. 1643.—Raikes, Samuels, and Loch, *Judges.*

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CALCUTTA, S. D. A.—*The 13th of May,* 1861.

Present:

C. B. Trevor, G. Lock, and C. Steer, Esqrs., *Judges.*

Case No. 623 of 1858.

AMEERUT MISSER, for SRI-RAM MISSER, (Defendant,) Appellant,

versus

DABEE PERSAUD and BEHARRY LAUL, (Plaintiffs,) Respondents.

No. 622 of 1858.

DABEE PERSAUD and BEHARRY LAUL, (Plaintiffs,) Appellants,

versus

AMEERUT MISSER, for SRI-RAM MISSER and others, (Defendants,) Respondents.

Held, on a question of the necessity of the sale of ancestral property, under the Mitákshará law, that the only proof of necessity was the recital in a *byna-namah* of a debt of Rs. 1,000 to a *zur-i-peshgee-dar*, which was to be paid by plaintiffs, if they wished to complete the sale, and their vendor failed to execute the conveyance, that the terms of this deed shewed no such pressing necessity of payment on demand.

Held further that only so much of the property should be sold as is sufficient to meet the claim, and that where the whole of the estate or a larger portion than absolutely required for this purpose is sold, it must be shown by the purchaser to the satisfaction of the Court, that the money required to pay off the claim could not be raised otherwise.

Plaintiffs sued to obtain possession of Mouzah Chuk Ajmeeree, Pergunnah Chuk Panee, under a *byna-namah* alleged to have been executed by Mohun Misser, father of the defendant, Sri-ram Misser, on the 8th August 1848, or 24th Sraban 1255 F. S. The terms of that deed recited, that Mohun Misser had, on its execution, received Rs. 1,000, and that he agreed to complete the sale to the plaintiffs of Mouzah Ajmeeree in six months from that date, for the sum of Rs. 5,900; that if Mohun Misser failed to execute the deed of sale, the plaintiffs, after paying Rs. 1,000, to a *zur-i-peshgee-dar* and depositing the balance of Rs. 4,900 with a banker in Mozufferpore, might take possession of the property, and the byna-namah should be considered as a complete bill of sale to them. Plaintiffs allege, that they frequently wrote to Mohun Misser to complete the sale, and on his failing to comply with the terms of the byna-namah,

they deposited Rs. 4,900 on 12th of Assar 1256, and paid Rs. 1,000 to the zur-i-peshgee-dar on 22nd *idem*, and that the vendor died without taking the money from the banker with whom it was deposited, and they now sue for possession under the byna-namah.

Two appeals have been preferred, one by the defendant on the merits, and the other by plaintiffs objecting to so much of the principal Sudder Ameen's order as refuses them mesne profits.

Judgment—

It is not denied that under the Mitákshará law, a father is incapable of selling ancestral property without the consent of his son then living, and as it is nowhere pleaded that the property in dispute was the self-acquired property of Mohun Misser, we must consider it as admitted by both parties to be ancestral. The question, therefore, for our determination is, whether there was at the time such pressing necessity existing sufficient to authorise Mohun Misser to sell the estate. The only proof of the necessity is the recital in the byna-namah of the existence of a debt of Rs. 1,000 to a certain zur-i-peshgee-dar, which was to be paid by the plaintiffs if they wished to complete the sale, and their vendor failed to execute the conveyance. This debt cannot under any circumstances be looked on as a pressing necessity; for when the byna-namah was drawn up, no immediate payment was demanded. That document provided for the completion of the sale in six months, and then left it at the option of the plaintiffs to pay the purchase-money or not; clearly indicating thereby, that the debt to the zur-i-peshgee-dar was not a pressing demand. It may be further observed, that even if there had been pressure for payment on the part of the zur-i-peshgee-dar, there was no necessity for selling the estate. The proprietor could, we think, have easily raised that sum on a mortgage of the property, and even if he had been necessitated to make a sale, it was, we think, unnecessary to sell the whole property. As a trustee, the father was bound to do the best he could for the property, and if the sale of a portion were sufficient to meet the claim, a portion of the estate only should have been sold. But it is urged, that circumstances may arise which render the sale of the whole estate necessary, though the debt required to be cleared off is comparatively small. We think, however, that the proper rule in all these cases,

keeping at the same time in mind the principles laid down by the Privy Council in the case of Hunnooman Pershad Pandey is, that only so much of the property should be sold as is sufficient to meet the claim, and that where the whole of the estate or a larger portion than absolutely required for this purpose is sold, it must be shewn by the purchaser to the satisfaction of the Court, that the money required to pay off the claim could not be raised otherwise. In the present case, as there was evidently no necessity, we hold the sale to be invalid, and, reversing the decision of the Principal Sudder Ameen, dismiss the plaintiffs' suit, with costs. We also dismiss the plaintiffs' appeal with costs.—S. D. A. Dec., for 1861, p. 193.

Where it has been found that, as to certain portion of the consideration-money of a deed of sale of joint ancestral property, there was a legal necessity, it is a correct principle to uphold the deed as to that portion of the land which bears the same proportion to the whole quantity conveyed as the money borrowed for the discharge of the legal necessity bore to the whole amount of the consideration-money.—*Raja-ram Tewaree* v. *Lutchman Pershad*, B. L. Rep. vol. IV, A. C. p. 118; and S. W. Rep. vol. XII, C. R. p. 478.

According to the Mitákshará, a father is not incompetent to sell immovable property acquired by himself.

Landed property acquired by a grandfather and distributed by him amongst his sons, does not by such gift become the self-acquired property of the sons so as to enable them to dispose of it by gift or sale without the consent, and to the prejudice, of the grandsons.

The sale by a father of ancestral immovable property without the concurrence of his sons is not necessarily void, though it may be voided, unless the purchaser can show that it was made, during a season of distress, for the sake of the family, or for pious purposes. In the absence of evidence to the contrary, it must be assumed that the price received by the father became a part of the assets of the joint family; and, therefore, if the son seeks the aid of the Court to set aside the purchase, he must do equity and offer to repay the purchase-money, unless he can show that no part of such purchase-money or the produce of it has ever come to his hands.—*Modun-gopaul Thakoor* and others v. *Ram-bukhsh Pandey* and others.—S. W. Rep. Vol. VI, p. 71.

CALCUTTA, H. C. A.—*The 29th of April*, 1863.

Present:

The Honorable Sir Barnes Peacock, *Kt. Chief Justice*, and the Honorable L. S. Jackson, J. B. Phear, A. G. Macpherson, and Dwarka Nauth Mitter, *Judges.*

MADHOO DYAL SINGH, (Plaintiff,) Appellant,
versus
GOLBUR SINGH and others, (Defendants,) Respondents.

Under the Mitákshará Law, a son is entitled to recover from a purchaser from his father ancestral property improperly sold by the father, and in the absence of proof of circumstances which would give the purchaser an equitable right to compel a refund from the son, the latter would be entitled to recover without refunding any part of the purchase-money.

But if it is proved that the son got the benefit of his share of the purchase-money, the son must refund his share of the purchase-money before he can recover his share of the property sold. And where the purchase-money has been applied to pay off a valid incumbrance on the estate, the right of the son to recover will be subject to that of the purchaser to stand in the place of the incumbrancer.

The *onus* in such cases to prove the application of the purchase-money lies on the purchaser.

This case was referred to the Full Bench on the 3rd of December 1867, by Kemp and Glover *Judges.*

The Judgment of the Full Bench was delivered as follows :—

Peacock, C. J.—The question upon which the opinion of the Full Bench is asked is, whether under the Mitákshará Law a son, who recovers his ancestral estate from a purchaser from the father upon proof that there was no such necessity as would legalize the sale, and that he never acquiesced in the alienation, is bound in equity to refund the purchase-money before receiving possession of the alienated property.

There can be no doubt that, although the word "recovers," is used in this question, the meaning is whether under the circumstances stated, a son is entitled to recover except upon condition of refunding the purchase-money. Assuming that to be the question, I think the answer should be that in the absence of proof of circum-

stances which would give the purchaser an equitable right to compel a refund from the son, the latter would be entitled to recover without refunding the purchase-money or any part of it. We express no opinion as to whether he would be entitled to recover the whole or only his share of the estate.

Having answered the question propounded, I think we ought to add that if it is proved to the satisfaction of the Court that the purchase-money was carried to the assets of the joint estate, and that the son had the benefit of his share of it, he could not recover his share of the estate without refunding his share of the purchase-money. So if it should be proved that the sale was effected for the purpose of paying off a valid incumbrance on the estate which was binding upon the son, and the purchase-money was applied in freeing the estate from the incumbrance, the purchaser would be entitled to stand in the place of the incumbrancer, notwithstanding the circumstance might be such that the incumbrancer could not have compelled the immediate discharge of it; and the decree for the recovery by the son of the ancestral property, or of his share of it, as the case might be, would be good, but should be subject to the right of the purchaser to stand in the place of the incumbrancer.

It appears to me, however, that the *onus* lies upon the defendant to show that the purchase-money was so applied. I do not concur with the decision which has been referred to from 6 Weekly Reporter, page 71, in which it is said that "in the absence of evidence to the contrary it must be assumed that the price received by the father became a part of the assets of the joint family." If the father was not entitled to raise the money by sale of the estate, and the son is entitled to set aside that sale, the *onus* is on the person who contends that the son is bound to refund the purchase-money before he can recover the estate, to show that the son had the benefit of his share of that purchase-money. If it should appear that he consented to take the benefit of the purchase-money with a knowledge of the facts, it would be evidence of his acquiescence in the sale.

I think the case must go back with this answer to the Division Bench which referred the question to us, in order that the case may be finally determined upon the merits by that Bench.—W. R. Vol. IX, page 511.

Held, that in a suit brought by a Hindú son, for himself and on behalf of three infant brothers, to set aside a sale of certain ancestral lands, which had been made by his father without his son's concurrence, the *onus* of proving that the payment of the debts, on account of which the property was sold, was not a common family necessity, was properly laid by the District Judge upon the plaintiff.—*Bábáji Sakhoji* v. *Rám Shet Pandu Shet* and *Shákhoji Shiváji.* Bomb. H. C. Rep. Vol. II, p. 23.

In a suit to recover possession of certain ancestral fields sold, during the absence of the defendant, who was united in interest, by his father, to the plaintiff, in consideration of the money advanced by her, out of her *Stri-dhun*, for the purpose of building the family house, of which the defendant possessed himself after his father's death: *Held* that the defendant, by retaining possession of the house, ratified the act of his father, and elected to take the house in lieu of the ancestral fields, the sale of which was declared to be valid, and possession thereof given to the plaintiff.—*Gungá Bái Kom Náráyan Bhatt Dátár* v. *Bámná-jí Abá-ji Dátár.* Bomb. H. C. Rep. Vol. II. p. 318.

CALCUTTA, H. C. A.—*June 20th*, 1873.

Before Mr. Justice Phear and Mr. Justice Ainslie.

RAJAH RAM NARAIN SINGH (Plaintiff,)

versus

PERTUM SINGH and others (Defendants.)*

Where, in a part of the country the general law of which is the Mitákshará, a custom exists, with regard to ancestral immoveable property, that it is not partible among the members of the joint family, but descends from the father to his eldest son, the father cannot alienate such property without the concurrence of his son, unless such alienation is justified by family necessity.

This was a suit for *khás* possession of Ruttunpore and other mouzas in Pergunna Gundhore, after setting aside a bond, a letter of assignment, and a *potta* for a term of eleven years, executed by

* Regular Appeal, No. 40 of 1872, from a decree of the Judge of Bhaugulpore, dated the 11th October 1872.

Rajah Mohender Nath Singh, the father of the plaintiff, on the ground that the property in dispute was the ancestral property of the plaintiff, that, according to the Mitáksharâ law and the custom of primogeniture which was prevalent in the family, the plaintiff's father had no right to alienate, and that, therefore, the plaintiff, as the eldest son and born during life-time of his father, was entitled to recover possession.

The Subordinate Judge found that the lease, bond, and letter of assignment formed parts of the same transaction; that the lease was a *Zur-i-peshgee* one, but was not such a transfer of ancestral property by the father, as, under the Mitáksharâ law, would entitle the son to sue for cancellation thereof, and that the loan under the bond was a *bonâ fide* transaction. He held that the bond and lease could not be interfered with. He accordingly dismissed the plaintiff's suit.

The plaintiff appealed to the High Court.

The judgment of the Court was delivered by Phear, J.—

With regard to the principal issue of fact in this case, we concur in the finding of the lower Court. It appears to us that the granting of the *ticca potta*, and the execution of the bond, were but two steps in one transaction by which the plaintiff's father secured to the bond-holder at least the repayment of the interest stipulated for in the bond, by means of the rents reserved in the *ticca* lease.

I therefore think, not only that the original transaction was a transaction having the character of a mortgage, a transaction which had for its purpose at any rate to secure to the bond-holder the payment of the interest due on his bond, but also that the ticca itself was a grant of a very beneficial character to the grantee; so that the grant, independently of its forming part of the mortgage transaction, would be an incumbrance upon the estate. In other words the incumbrance effected by the assignment of the *ticca* rent to secure the payment of the interest on the bond was increased by reason of the inadequacy of that rent. With this view of the facts of the case, it remains to be considered whether the plaintiff had a right to ask for possession and enjoyment of the property free of these incumbrances which his father had put upon it.

Thus we come to the question whether the father held and enjoyed the property with the incidental power of alienating or incumbering it as against his successors.

It is perhaps somewhat unfortunate that no issue of fact was distinctly raised in the Court below for the purpose of ascertaining the nature of the father's proprietary right in this property. But we have it asserted in the plaint, and not contradicted by the defendants, that the property in question had descended to the plaintiff's father from his father. It was therefore in the hands of the plaintiff's father an ancestral property as distinguished from a self-acquired property; and its incidents and the rules which would govern its descent, would therefore be those prescribed by the general law of the land in that part of the country, namely, by the Mitákshará law, excepting so far as that might be controlled or overridden by the operation of an established custom or other special authority. And in the absence of any such exceptional disturbing force, I need hardly say that one of the incidents of ancestral property in the hands of the father (as I have just observed this property was) would be that he would have no power of alienation or of incumbering as against any members of the family who were joint with him in respect of his property.

Now, admittedly, the present plaintiff was born during the life-time of his father and while the father had this property; and, therefore, by the Mitákshará law, if it operated uncontrolled, the plaintiff immediately became joined with his father as regards right to his ancestral property, and any alienation or incumbrance which the father at any time should make without his concurrence would be void as against him, unless it was justified by family necessity.

In this way I think we have reached a point in the case, at which we must enquire whether there has been any established custom or any other established authority proved such as had the effect of overriding the general law, the Mitákshará law, which otherwise would govern the incidents and descents of this property.

Some such custom or authority has been made out to a certain extent, or rather we must take it that there is in this case something of the kind active. For the plaintiff in his plaint asserts that this property is impartible amongst the members of the joint family, and descends from the hands of the father to those of the eldest son, if he has sons, and so on: in other words that it is not in any form divided or distributed amongst the members of the joint family. The defendant does not deny this, and consequently

we must take that as a fact in the case. If then the custom or authority has this effect, and so far controls the general law, but does not go further, there must still remain the other incidents, one amongst others is that the holder of the property cannot alienate any portion of it, excepting for a family necessity, without the consent of all the members of the joint family. It seems to me that in arriving at this position, we have the authority of the Privy Council expressed in several judgments; in particular it is expressed in the judgment in the case of *Sree Rajah Yaunmula Venkayamah* v. *Sree Rajah Yaunmula Boochia Vankondara.** Another case, in which the like doctrine has been lately enunciated by a judgment of this court, is *Maharani Hira-nath Koer* v. *Baboo Ramnarayan Sing.*†

It appears to me then, on the facts with which we have to deal, that we must take the property which is the subject of suit to have been ancestral property, which descended with the joint family in the ordinary way, subject to the effect of an established custom in regard to its partibility amongst the existing joint members of the family; and in this view of the facts it is evident that the father had no power against his son, who was unquestionably joint with him as regards this property, to alienate or incumber the estate, excepting upon a justification of a family necessity. No such ground justifying the father's deeds of 21st and 22nd Asar (13th and 14th July) has been even attempted to be proved.

The result to my mind is that the plaintiff is entitled to have it declared that the two deeds, the *ticca potta* and the bond of the 21st and 22nd of Asar had the effect of placing an incumbrance on the estate, and that the plaintiff was entitled to have possession of the property at the time of his father's death free from that incumbrance. The plaintiff must have his costs in both the courts.—*Appeal allowed.*—B. L. Rep. vol. XI, p. 397.

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* 13 Moor., I. A., 333

† 3 B. L. R. P. C., 13;—12 Moor. I. A., 523.

AGRA, S. D. A.—*The 30th of January,* 1862.

Present:

M. R. Gubbins, Esq. and A. Ross, Esq., *Judges.*

Case No. 147 of 1861.

TIRBEYNEE DOOBEY and others, (Plaintiffs,) Appellants,
versus
JUTTA SHUNKUR, and RAM KULLEE his wife,
(Defendants,) Respondents.

Held, following the recorded opinion of the Hindoo Law Officer, that a father, who after dividing his property among the sons by a first marriage, retaining a maintenance for himself, afterwards remarries and acquires fresh property, exceeding his former property in value, is competent to transfer the property thus remaining and acquired, to his second wife, *provided that it is done for the benefit of the issue by the second marriage.*

TIRBEYNEE and others, plaintiffs, are sons and grandsons by a first marriage of Jutta Shunkur, the first defendant, and the second defendant, Ram Kullee, is Jutta Shunkur's wife by a second marriage. Jutta Shunkur has transferred to Ram Kullee considerable property belonging to him; and his issue by the first marriage contest his right to do so, and sue to set the transfer aside.

It appears that before contracting the second marriage, Jutta Shunkur divided his property among his two sons by his first marriage, retaining a moderate share for his own use. After so doing, he married Ram Kullee, and has had a son by her; and plaintiffs, appellants, represent that the property which he has now transferred to her, comprising the reserved share of his former estate, and other property since acquired by him, exceeds that which by the former division is assigned to them.

The transfer to Ram Kullee was made in this manner. Ram Kullee sued her husband, and he confessed judgment; and subsequent thereto, the son by the second marriage was born.

The Moonsiff who first decided the case, passed a decision in favor of plaintiffs, based on an opinion given by the Hindoo Law Officer, that the father could not thus alienate the property in favor of his second wife, to the injury of his sons by the first marriage.

On appeal to the Principal Sudder Ameen, it was urged by the defendants, that the transfer had been made for the benefit of the issue expected by the second marriage, which issue had actually resulted, a son being born and alive when the plaintiffs commenced their action. The Principal Sudder Ameen then consulted the Hindoo Law Officer again, enquiring whether the transfer, if made for the benefit of the issue by the second marriage, were lawful or not? which question the Hindoo Law Officer answered in the affirmative: and thereupon the Principal Sudder Ameen reversed the Moonsiff's decision, and decreed for the defendants.

Plaintiffs now prefer a special appeal on the ground, that there existed no issue of the second marriage when the disputed transfer was made; and further, that the decree obtained by Ram Kullee, contained no specification that it was for the benefit of her issue.

Judgment—

We have referred the question put by the Principal Sudder Ameen to the Hindoo Law Officer, and we find that it correctly represents the facts of the case. And we see no reason to question the correctness of the answer given, or of the decision thereon founded. We attach little importance to the objections taken in special appeal. For at the present time, the transferer, transferee, and their son, are all alive; and if the speical appeal exceptions were admitted, and the transfer admitted under the Hindoo Law, (as declared in the second bywustha,) a new transfer could at once be made, which would be equally injurious to the plaintiffs, appellants. We accordingly affirm the decision, and dismiss the special appeal with costs.—Agra S. D. A. Dec. for 1862, p. 71.

MADRAS, S. D. A.—*The 6th of January*, 1862.

JAVAV PARI, Special Appellant,

versus

JAKEE PARI, Special Respondent.

Special Appeal No. 121 of 1861.

The plaintiff and defendants in this case are brothers. The former sued for the recovery of a third share of that part of the family-estate which had been reserved in 1842 as the share of their deceased father on division taken place between the father and the sons. The father himself died in the year 1857.

The first defendant pleaded that the father had from motives of affection and gratitude for kindness shown to him in his declining years, bestowed his share upon the second defendant in the year 1848, and that the first defendant is now in possession in virtue of a sale executed by second defendant in 1857. The second defendant himself, in a separate answer, acknowledged the truth of this statement.

The District Moonsiff was of opinion that the gift of his share by the father to second defendant was illegal, and that the three brothers were entitled to divide the share of their deceased father into equal portions. He accordingly gave judgment for the plaintiff with costs; and this decision was confirmed in appeal by the P. S. Ameen.

The first defendant preferred a special appeal against this latter judgment.

On the case coming on for hearing, it became apparent that the decision depended on a point of Hindoo law which had been sufficiently considered by the lower courts. The follwing question was accordingly proposed to the law officers of the Sudder Court.

"A, the father of three sons, B, C, and D, divides his property with them, reserving a share to himself. Can A subsequently bestow the share thus reserved upon B, to the exclusion of C and D? and after A's death is B entitled to the property thus bestowed upon him by the father, or are C and D also entitled to the shares?

To this question the Pundits returned the following answer.

As a division between father and sons annihilates the latter's right in the property of the former, the father is competent to alienate his share to any person whatever, and his sons have no right to object thereto.

For this reason, B, referred to in the question, is, after the demise of A, entitled to the property bestowed upon him by A;—C and D are not entitled to share in it.

Authority.

Vijnaneswariyum Yajnavulcya says: "But effects which have been given by a father or by the mother belong to him on whom they were bestowed.

The law officers having thus pronounced an opinion in favor of the validity of the gift, by which the share of the father was conferred upon the second defendant, to the exclusion of the other brothers, the Sudder Court proceed to reverse the decision of the lower Courts, and dismiss the claim of plaintiff with alll costs of suit.*—Mad. S. D. A. Dec. pp. 1 and 2.

Moveables given to a relation from affection, cannot be claimed again.—*Mt. Murooat,* v. *Kulgundas.*—Borr. Rep. Vol. I, p. 284.—Norton's Leading Cases, Part II. p. 316.

MADRAS, S. D. A.—*The 24th of October,* 1860.

MUTTU-MAREN, Special Appellant,
versus
LAKSHMI, Special Respondent.

A father is not competent to alienate his immovable property, *whether ancestral or self-acquired, to the prejudice of his sons, except under urgent necessity.*

The suit has been brought for recovery of land assigned to plaintiff in 1832 by Vira-muthu Reddi the father of the first and

* See the *Vyavasthás* with the authorities and annotations relative to the above, in Vol. I.

third defendants and the husband of the second. The District Moonsiff discredited the evidence adduced by the plaintiff and dismissed the suit.

The P. S. gave a decree for plaintiff.

Judgment—the Court (present Strange and Ferere) remark that by Hindoo law, the father, Vira-muthu Reddi was not competent to alienate his immovable property, *whether ancestral or self-acquired,* to the prejudice of his sons. The first and third defendants and the husband of the second defendant, it may be gathered, were minors at the date of the assignment.

Such being the case, their father could only make the assignment to the destruction of their rights under urgent necessity, and no such necessity has been shewn. That they subsequently consented to the plaintiff's enjoyment of the land under a title adverse to their own does not appear. The occupation of Samigan during their father's life-time would disclose no such title to them, neither would the subsequent occupation by their brother Kuppan. The registry has up to this day remained unchanged and the public evidence of title has thus continued in themselves.

The Court are, therefore, of opinion that the plaintiff's title is an invalid one, and in reversal of the decree of the P. S. Ameen, they resolve to dismiss the suit with costs.—Mad. S. D. A. Dec. for 1860, pp. 227, 228. See the fourth edition of Strange's Hindoo Law by J. D. Mayne, Esq., p. 363.

A Hindú having male issue cannot alienate *any* of the ancestral property. Tandava-roya Gaunden *v.* Tandova-roya Gaundan. Mad. S. D. Dec. 12th February 1859, p. 40.—*Vide Ibid.*, p. 362.

Under the Benares law a man's immovable property, though self-acquired, is not within his power of disposal so absolutely by gift in his life-time as to enable him to give it to one son or grandson in exclusion of the rest.—*Maha Sookh* v. *Budree.* N. W. Rep. Vol. I, p. 103.

PRIVY COUNCIL.*

The 25th, 26th, 27th, & 28th of June, 1862.

NANA NARAIN RAO Appellant, and HUREE PUNTH BHAO, SREE NEWAS RAO and BULWUNT RAO Respondents.

On appeal from the Sudder Dewanny Adawlut, North-West Provinces, Agra.

By the Hindoo law as administered in the North-West Provinces, a Hindoo has power to make a testamentary disposition in the nature of a Will.

A disputed Will, made by a Hindoo, disposing of self-acquired estate among his family, established.

Charges of fraud, forgery and perjury having been made by the Respondents against the Appellant, the party who propounded the Will, costs of the Courts in India, and upon appeal to England, were, upon reversal of the decree of the *Sudder* Court, ordered to be paid by the Respondents.

LORD KINGSDOWN :—

The question in the original appeal in this case is as to the genuineness of an instrument alleged by the Appellant to be the Will of *Ram Chunder Punth,* deceased, the father of the Appellant and respondents; the Appellant bieng the eldest son, and the Respondents the two younger sons, of the alleged Testator. The *Zillah* Court of *Cawnpore* decided in favor of the will. The *Sudder Adawlut* of the North-West Provinces reversed that decision, but held that certain property which the Respondents alleged to be a part of their father's estate belonged to the Appellant.

Against the decision on this point, and against a determination of the Court with respect to the amount of the alleged Testator's property, with which the Appellant is to be charged, there is a cross-appeal by the Respondents.

Ram Chunder Punth in his life-time was *Sooba-dar,* an officer of rank and distinction, in the service of the *Maha-rajah,* the *ex-Peishwa.* He had accumulated a large ptoperty, and had invested some part of it, not very considerable in proportion to the whole, in the purchase of land.

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* Present :—Members of the *Judicial Committee,*—The Right Hon. Lord Kingsdown, the Right Hon. Lord Justice Knight Bruce, the Right Hon. Lord Justice Turner, and the Right Hon. Sir Edward Ryan.

Assessors :—The Right Hon. Sir Lawrence Peel, and the Right Hon. Sir James W. Colvile.

He had two wives, three sons, and at least one daughter. He had a residence at *Bithoor*, and he had a smaller house—a *Bungalow*, as it was termed by one of the Respondents' Counsel, at *Cawnpore*—at the distance of about ten miles from *Bithoor*.

There seems nothing in this Will which to English notions would appear unreasonable. The eldest son was to maintain the rank and position of the family; he had issue which the younger sons (who had arrived at the age of manhood and appear by the Will to have wives) had not, and the provision seems to be such as a prudent Testator might be supposed very likely to make who was inclined to found a family.

The evidence in support of the Will is singularly strong.

We think the circumstances of the case are strongly in favour of the Will. It contains such a disposition of his property as it was extremely probable that the Testator should make, and extremely unlikely that the Appellant should introduce into a forged instrument. The Testator was of great age. He had placed his eldest son in his place with respect to the management of all his affairs in his life-time. He might very naturally desire to keep together in his family the wealth which he had acquired by his own exertions, and to prevent its dispersion by division amongst his sons. His eldest son had issue, his other sons had none; and he had the example of his master, the *Peishwa*, to follow, who had adopted a son and made a Will in his favour. The witnesses in favour of the Will are in general less open to exception than is usual in Indian cases, and some of them entirely unexceptionable. The *Zillah* Judge who has seen them has come to an opinion in favour of the Will, and appears to doubt whether the opposition to it is really the spontaneous act of the Respondents.

Their Lordships are of opinion, that the reasons assigned by the *Sudder* Court for its judgment are quite unsatisfactory. The view which they take of the original appeal makes any consideration of the cross-appeal unnecessary. It must of course be dismissed. They must humbly advice Her Majesty to reverse the decree of the *Sudder* Court on the original appeal, and to restore that of the *Zillah* Court; and considering that the Respondents' case is founded on an allegation of fraud, perjury and forgery, which, in their Lordships' opinion, fails, they think they cannot do justice without ad-

vising, that the Respondents should be ordered to pay all the costs of the suit in both the Courts below, and of both the appeals to Her Majesty.—Moore's Indian Appeals, Vol. IX, pp. 96—99, 102, 103, 122, and 123.

Under the Mitákshará Law, a father can dispose of his self-acquired property movable and immovable, at his own will, and he can, by will, make an unequal distribution* of the same amongst his heirs.—*Bawa Misser* father and guardian of *Mukond Lall Misser*, minor, and others (Defendants) Appellants, v. *Rajah Bishen Perkash Narain Singh*, (Plaintiff,) Respondent.†—S. W. R. Vol. X, p. 287.

PRIVY COUNCIL.—*The* 17*th May* 1873.

Present:

Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

On Appeal from the High Court of Judicature at Fort William in Bengal.‡

RAJAH BISHEN PERKASH NARAIN SINGH,

versus

BAWA MISSER and others.

Under the Mithila law, self-acquired property can be given by its owner at his pleasure.

The Mitákshará law requires the son's consent; but the fact of the son's being in debt does not incapacitate him from consenting.

The facts of this case and the law which arises upon them may be very shortly stated. Dabee Dutt Misser, shortly before his death, executed an instrument, whereby he gave to his only son, who was considerably in debt at that time, his ancestral property. His self-acquired property he gave to his grandsons and to his then second

* See, however, the Chapter on Partition by a father of his self-acquired property.

† Decided by *Kemp* and *E. Jackson J. J.*, on the 21st of August 1868.

‡ From the judgment of Kemp and E. Jackson, J. J., in Regular Appeal, No. 83 of 1868, decided 21st August 1868.—10 W. R., 287.

wife, afterwards his second widow. At the same time he made his son the guardian of these grandsons during their minority. It was contended in the first place that he had no right to make this disposition of his property, and secondly that this deed was fraudulent; the intention of Dabee Dutt being that, although upon the face of the deed the property was given to the grandsons, it should really belong to the son, and that the transaction was not a real but a colorable one. The Principal Sudder Ameen appears to have adopted this view, but their Lordships are of opinion that there was no sufficient evidence to support it. The only evidence at all pointing in the direction of that finding would be that, after the death of Dabee Dutt, the son remained in possession of the property, but inasmuch as the grandsons were minors and he was appointed their guardian, that possession was not inconsistent with the deed.

The High Court reversed the decision of the Principal Sudder Ameen, finding that the transaction was a real one and not merely a colorable one, a finding in which their Lordships concur.

It only remains then to be decided whether or not by law Dabee Dutt was enabled to make this disposition of his property. The transaction occurred within the Mithilá District, and the Mithilá law would prevail. Of that law the principal authority is the Vivâda Chintâmani, in which it is laid down in very plain terms, without qualification, that self-acquired property can be given by its owner at his pleasure, and subsequently it is stated that "the father has full dominion over the property of his father, which, being seized, is recovered by his own exertions, or over that which is gained by him through skill, valour, or the like. He may give it away at his pleasure, or he may distribute it." In their Lordships' view this dictum would apply.

But it has been argued that, under the Mitákshará law, the father could not dispose of the property away from his son without the son's consent. The Mitákshará law appears to be referred to undoubtedly by the learned judges of the High Court as applying to this case. But assuming (what it is not necessary to decide,) that the Mitákshará law applied, and assuming the Mitákshará law only to admit of the father making such a disposition with the consent of his son, in this case the consent of the son was given. It was indeed argued that because the son was in debt he could not con-

sent, but their Lordships are of opinion that there is no foundation for that argument. The consent of the son was given, and in either view Dabee Dutt exercised a power which by law appertained to him.

On these grounds their Lordships are of opinion that the decision of the court in India was right, and that this appeal must be dismissed with costs, and will humbly advise Her Majesty to this effect.—S. W. R. Vol. XX, p. 137.

There is distinction between ancestral and self-acquired property under the Mitákshará law with regard to a father's right to dispose of it. The fact of being an out-caste would not prevent him from exercising his rights as he might otherwise have done.* *Ojodhya Persaud Singh,* v. *Rám Surn* and others.—S. W. R. Vol. VI, p. 77.

Toofanee Singh, who with his only son Jugdeep Narain formed a joint Hindu family subject to the Mitakshará law, executed in favour of Deen-dyal Laul, a bond whereby he professed to pledge certain family property as security for the repayment of money advanced to him by Deen-dyal. Default being made in repayment of the loan when due, Deen-dyal brought a suit on the bond against Toofanee Singh, and obtained a decree for the amount secured thereby, but not for the sale of the property. In execution of this decree, Deen-dyal attached and caused to be sold the right title and interest of Toofanee Singh in certain other family property not covered by the bond, and himself became the purchaser thereof, and took exclusive possession of the whole of the property. Jugdeep Narain then brought a suit against Deen-dyal and Toofanee Singh to recover possession of the property purchased by the former on the ground that he and his father having been members of a joint Hindu family under the Mitákshará law, the purchaser of the father's rights and interests could obtain nothing; and that no legal necessity existed for the loan.

* See the Rules respecting Exclusion from Inheritance, and the precedents &c., relative thereto.

Held that Toofanee Singh had no individual right to any portion of the property which he could pass to a third person, and, therefore, Jugdeep Narain was entitled to have the alienation set aside, and recover possession of the property. If the judgment creditor had got a decree for the sale of the property pledged by the father's bond, and executing such decree had sold and bought the property, he would have been entitled to insist on a partition of the property between the father and the son* before it was delivered back. Further, if the judgment creditor, even under the money decree, could show in a regular suit that there was no property belonging to the father which he could find or reach other than that in which the father was jointly interested with his son as a Mitâksharâ family, he would have a right to insist on such a partition as would enable him to satisfy his decree in execution. Or if there had been anything amounting to a voluntary representation by the father of his having any right and interest in the property, or any representation of fact made by him in order to induce Deen-dyal to advance the money, it would give rise to an equity between him and the creditor such as would entitle the latter to call on the former to divide the property with his son, so as to make the share of Toofanee available by the creditor to the extent of the loan.—*Jugdeep Narain Singh* (Plaintiff) Appellant v. *Deen-dyal Laul* and *Toofanee Singh*, (Defendants,) Respondents. B. L. R. Vol. XII, p. 100; S. W. R. Vol. XX, p. 174. *Maha-beer Pershad* v. *Ram-yad Singh*† distinguished.

In a suit by four sons, members of a joint family, for determination of right of partition of family property which had been mortgaged by their father as security for a loan, and had been sold in execution of a decree, the father being still alive, as well as his second wife who was not incapacitated by age from bearing children.

Held that the mortgagee could not stand in a better position than the father against whom the sons had a right to require partition of the property so far as it was ancestral. *Lochun Singh* and others v. *Nim-dharee Singh* and another.—S. W. R., Vol. XX., c. r. page 170.

* This is a doctrine which does not appear to have been expressed in any of the previous cases in this side of India, but in Bombay and Madras.

† To be found in the Chapter on Partition.

CALCUTTA. H. C.—*The 9th of September,* 1864.

Present:

The Honorable F. B. Kemp and F. A. Glover, *Puisne Judges.*

Case No. 757 of 1864.

BISSUMBUHR NAIK, (Plaintiff,) Appellant,

versus

SUDA-SHIB MOHA-PATTUR and others,

(Defendants,) Respondents.

Under the Mitákshará law, according to which the father and son are joint owners in the ancestral estate, the son's power to prevent alienations by the father extends to Acts of waste, and not to alienations for the payment of joint family debts and for maintenance of family.

This was a suit for a declaratory decree setting aside certain alienations of ancestral property made by the father of the plaintiff.

In special appeal, it is contended that as the parties are governed by the Mitákshará law, and under that law the father and son are joint owners in the ancestral estate, the alienations by the father without the consent of the son are illegal and void. A decision of the late Sudder Court, dated the 8th June 1861,* is quoted in support of this contention.

The lower Court having found that the alienations by the father were made under legal necessity to pay the debts of the joint family, and for the maintenance of the family, we have only to consider whether the consent of the son was necessary, and in the absence of such consent, whether the sales are void.

In the case quoted by the pleader, it was ruled that under the law of Mithilá, the father and son are joint owners, and that the father can only exercise the power of alienation in the case of a minor son existing at the time, under circumstances of legal necessity. The Court did not go beyond this and lay down, whether a father could alienate for legal purposes in the case of a major son existing, without the consent of the son.

We fully admit that, under the Mitákshará law which governs this case, the father and son are joint owners in the ancestral pro-

* See *ante*, page 63.

perty, but we hold that the son's power of interdiction to prevent alienations by the father of the ancestral estate extends to acts of dissipation or waste of the property only, and not to alienations for the payment of joint family debts and for the maintenance of the family. See Mitákshará, page 179, Section X.

We fail to see why it should be legal for a father to alienate for legal necessity, where a minor son exists who cannot protect his interests, but illegal where there is a son who has arrived at majority, and can exercise the power of interdiction if the father commits waste, but fails to do so and stands by and allows innocent purchasers to give a good consideration for the properties. In the present case, we find a father making alienations of properties of no great value (the suit is laid at some Rupees 131) to pay debts and to maintain the family. These are indispensible duties and such as no good Hindoo can neglect. The son, eleven years eleven months and twenty-eight days after date of these alienations, brings this suit to question his father's acts, and wholly fails to prove that those acts were acts of waste, or that the debts were contracted for an improper purpose. In fact, the suit is clearly brought to defraud the purchasers, and under the circumstances, we cannot but think that the father and son are colluding together.

We dismiss this Appeal with costs and interest payable by the Appellant.—S. W. R. Vol. I, p. 96.

A Hindu died leaving a son and grandson. Held, that the son could not alienate the ancestral property without the consent of the grandson, and that the grandson might put in his claim for his half share, in the event of his father wishing to alienate it.—*Duya-sunker Kasee-ram*, v. *Brij-vullubh Motee-Chund.* Bombay Sel. Rep. p. 41. *Vide* Morley's Digest, Vol. I, p. 44.

BOMBAY—H. C. A.*—*The 6th of July*, 1864.

GANGÁ-BÁI KOM NÁRÁYAN-BHAT DÁTÁR, Appellant,
versus
VÁMANAJI ABÁJI DÁTÁR, Respondent.

In a suit to recover possession of certain ancestral fields sold, during the absence of the defendant, who was united in interest, by his father, to the plaintiff, in consideration of money advanced by her, out of her stri-dhun, for the purpose of building the family house, of which the defendant possessed himself after his father's death : *Held* that the defendant, by retaining possession of the house, ratified the act of his father, and elected to take the house in lieu of the ancestral fields, the sale of which was declared to be valid, and possession thereof given to the plaintiff.

The original suit was instituted by Gangá-bái, on the 19th of January 1862, to recover from the defendant certain fields, which had been sold to her by his father, Abáji, for Rs. 250, by a deed of sale dated the 3rd of Bhádra-pada Vádya, Shaké 1781 (A. D. 1859); and were, she alleged, in her possession till the month of Choitra, Shaké 1784, when the defendant deprived her of them.

The defendant, in his written statement, alleged that the fields in question were in the possession of his father up to the time of his death, and since then in his own possession, that the plaintiff was his paternal aunt, and resided with his late father, with whom he (Vámanaji) was on bad terms; that his father had no right alone to sell the fields which were ancestral property; that he did not know that his father had passed the bond; that his father was not in such circumstances as to be obliged to incur debt; and that the deed sued upon might be without any consideration.

The following decree was made (by the High Court):—The Court is of opinion that the respondent's father, Abáji Bápuji Dátár, had full power to alien the field called Savreh, that field not having been ancestral property.† The Court is further of opinion that the said field, called Savreh, and the two other fields found to be ancestral property, were aliened by Abáji Bápuji Dátár for a family purpose, namely, to provide the funds necessary for building a family house; and that the respondent, by possessing himself of the family

* Present: Westropp and Tucker, *Judges*.
† But see the Principles (in Vol. I,) with respect to self-acquired immoveable property.

house, built with the funds, so provided, has precluded himself from disputing the propriety of that alienation, even so far as regards the two fields which have been found by the District Judge and Munsif to be ancestral estate.

This Court, accordingly, reverses the decree of the District Judge and the Munsif; and declares the deed of sale (exhibit No. 3), dated the 3rd of Bhádra-pada Vádya Shaké 1781, to be valid; and directs possession of all of the property, sued for, to be given to the appellant, Gangá-bái, and orders the costs of the appeal and of this suit to be paid by the respondent. *Appeal allowed.* Reid's Bombay H. C. Rep. Vol. II, p. 318.

Where ancestral property is sold by the father, the son is entitled to sue for cancelment of such sale, and the decree should not be that the property is ancestral, and will pass to the father's heirs on his death, but a decree cancelling the sale so far as it obstructs him in asserting his right and in effect declaring the sale to be invalid, without interfering with actual possession, that may have been obtained by purchaser.—*Baboo Ram* and others v. *Guja-dhur* and others.—Agra Rep. F. B., Vol. I, p. 86.

According to *Sudabert Persad Sahoo* v. *Foolbash Koer*, a sale of undivided ancestral property by a father without any legal necessity, and without the consent of all the co-sharers is, under the Mitákshará law, invalid. It is not valid even as regards the father's share. A son going to set aside such an alienation is, according to that case, entitled to a declaration that the alienation is void altogether. The son suing in the father's life-time on behalf of the famliy may be entitled to a decree for possession. Upon what terms that decree should be made will, according to the decision in *Madhoo Dyal Singh* v. *Golbur Singh*,* depend on the equity which the purchaser may have to a refund of the purchase-money or to be placed in the position of an incumbrancer, as against the joint family in the particular case.—*Hunooman Dutt Roy* and another v. *Baboo Kishen Kishor Narayan*.—B. L. R. Vol. VIII, F. B. p. 358;—S. W. Rep. Vol. XV, F. B. p. 6.

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* Ante, page 84.

Under the Mitákshará law, a single member of a family is empowered to sell immovable property for the purpose of paying off family debts only where the sons and grandsons are minors or otherwise incapable of giving their consent.

Where the sale of landed estate by a single member is set aside because made without the son's consent, the son can only get possession on repayment of the purchase-money which was applied to the liquidation of the debts.—*Muthoora Coonwaree* v. *Bootun Singh*.—S. W. Rep. Vol. XIII, p. 31.

A son may sue to obtain declaration that sales by his father, without his consent, are, as against him, void and inoperative to pass or to affect any rights possessed by him in the property, and also that property still in his father's hands is ancestral, and cannot be alienated, except under circumstances recognised by the Mitákshará law as justifying alienation, and with the consent of those whose consent is by that law requisite.—*Kanth Narain Singh* v. *Prem Lall Paurey*.—S. W. R. Vol. III, p. 102.

Where property in which two members of a Hindoo family are jointly interested is sold in order to raise money for the payment of a debt jointly contracted by both, the son of one of them can not sue to recover his own, or his own father's, share in the absence of the other. In such a suit, if it is alleged that the father is connected with the institution of the suit with a view to defraud creditors, an important issue is raised which should be tried and decided.—*Sheo-churn Narain Singh* v. *Chukrun Pershad Narsing Singh*.—S. W. R. Vol. XV, p. 436.

A member of an undivided Hindoo family living under the Mitákshará law, in his father's life-time, brought a suit for a declaration of his future right to one-sixth share in a portion of the immovable property of the family, and to set aside an alienation of it by his father, as having been made without legal necessity. *Held* that no such suit was maintainable.—*Raol Gorain* v. *Teza Gorain*, B. L. R. Vol. IV, p. 90,

According to the Mitákshará law, a son has a right during the life-time of his father, to set aside alienation of ancestral property

made without his consent. His cause of action arises from the date when possession is taken by the purchaser.—*Aghory Ram Surug Singh* v. *J. Cochrane.*—B. L. R. Vol. V, p. 14.

A, a Hindu, subject to the Mitákshará law, sold his right and interest in the undivided ancestral estate of his family without the consent of his co-sharers, and not for the benefit of the estate, but in order to pay off a personal debt. The sale was by auction to an innocent purchaser for value. *Held* that, in a suit brought within twelve years from the date on which the purchaser obtained possession, the sons and grandsons of A, deceased, were entitled to recover possession without making any refund of the purchase money.—*Nathu Lall Chowdry* v. *Chadi Sahi.*—B. L. R. Vol. IV, p. 15 and S. W. R. Vol. XII, p. 446.

Limitation can be pleaded as a bar to a suit to set aside an alienation by a grandfather, the cause of action in such a case arising not from the date of the grandfather's death, but from the date of the alienation.

The right of an unborn son to sue does not give a perpetual right of action. When neither want of enquiry nor *mala fides* is shown, the existence of legal necessity must be presumed, and the acts of the guardian considered to be the acts of the minor.

Quære.—Whether the same rule strictly applies to the relation of the head of the family, and his descendants holding vested rights in his estate, in regard to alienations by the head of the family to which the descendants did not expressly consent.—*Seetul Persad Singh* v. *Gour Dyal Singh.*—S. W. R. Vol. I, p. 283.

In a suit by a son to annul an alienation of ancestral property by his father, *onus* is not on the son to prove the absence of necessity for the sale, but on the purchaser to prove the existence of the necessity.—*Jugdel Narain Suhaye* v. *Lalla Ram Prokash* and others.—S. W. R. Vol. II, p. 292.

CALCUTTA, S. D. A.—*The 17th of September*, 1859.

Present:

C. B. Trevor, and E. A. Samuells *Esqrs., Judges*, and
H. V. Bayley *Esq. Officiating Judge.*

GOPAUL-DUTT PANDEY for self and as Guardian of CHUTTOOR-BHOOJ PANDEY, heirs of JUGGO-MOHUN PUNDIT, (Plaintiffs), Appellants,

versus

GOPAUL-LAUL MISSER and others, (Defendants,) Respondents.

Held, that the consent of nephews to the sale by the uncle of his share of ancestral property is requisite, neither according to the Mitákshará, nor to the Hindoo law as current in Mithilá. The consent of sons and grandsons is alone necessary to the sale, by the father, of ancestral property. The principle of the distinction, as stated in the Mitákshará, is, that a son has an inchoate right in the possession of his father from the time of his birth, whereas a nephew has no right at all in the ancestral property in the possession of his uncle, until after the death of the latter.

Judgment—

In this case the special appeal has been admitted to try whether the Judge has not erroneously held that the consent of nephews is necessary to render valid alienation of property under the Mithilá law. We consider it quite clear from the Mitákshará, Colebrooke, page 210, para 3, and from Macnaghten's Hindoo Law Vol. I, page 46, that the consent of nephews is not requisite under either the Mithilá or Mitákshará Law, but those whose assent is necessary are sons or grandsons. The principle of the distinction is explained in the passage from the Mitákshará, cited, viz., 'that a son has a right on his father's property from the time of his birth; whereas a nephew can have no right until after the death of the party from whom he inherits.'

The special respondent's pleader has been unable to show us any authority of Hindoo law, or any precedent in point, opposed to this view.

We, therefore, decree the special appeal, with costs of special Respondents.—S. D. A. Dec. for 1859, p. 1314.

CALCUTTA, S. D. A.—*The 14th of March*, 1859.

C. B. Trevor, Esq. *Judge*, and H. V. Bayley, Esq., *offg. Judge.*

GOPAUL SINGH, Plaintiff,

versus

BHEEKUN LAUL and others, Defendants, Petitioners.

Held, that plaintiff suing for 10¼ annas of a property and averring possession of 6¼, can only sue for 4 annas. Held, that where parties agreed to a decision according to the Mithilá law, the specific authorities of that law, and not those of Mitákshará, should be cited to support a bywastá.

Held, that as the Hindoo law only contemplates the illegality of a father's alienation without a son's consent, in certain cases, a suit by a nephew against his uncle's alienation was wrong; and, further, was not referred to in the bywastá relied on.

Held, that the Judge's dictum, that a deed must always speak for itself, was incorrect, and that in many cases its terms are to be interpreted by the surrounding circumstances of the case.

Plaintiff, alleging that his father and uncle had illegally alienated certain ancestral property to his prejudice, by two sales, sued to set aside those sales, and for possession of so much of the property as was not in his possession.

On special appeal by plaintiff to the Sudder Dewanny Adawlut, the case was remanded on the 23rd of October 1857, (page 1506,) with this order: "The Judge, in confirming the decision of the Lower Court against plaintiff, has applied a precedent cited in Macnaghten's Hindoo Law, Vol. II, page 312, and decided this case with reference to the doctrine therein laid down. It is urged in special appeal that the case in question is a Bengal case, and, consequently, of no authority in the present one, which is in Tirhoot, whithin the province of Behar. We admit the plea and remand the case, in order that it may be tried according to the law and precedents in force in Behar."

The Zillah Judge on this asked the Provincial Pundit at Patna, "whether a father in Zillah Tirhoot can, under any circumstances, alienate any portion of ancestral property, according to the Hindoo law." The Pundit replied, that a father could do so in case of a famine, for the maintenance of his family, for ancestral and funeral debts, his own or children's marriage, and debts incurred for religious acts. The Judge states: "the Pundit adds, 'this opinion is accord-

ing to the Hindoo law, current in Mithilá, Zillah Tirhoot, province Behar, and the Mitákshará'." The Pandit then cites two authorities, both from the Mitákshará. The Judge then held that the deeds did not disclose the necessity required by Hindoo law. He at the same time remarked that the deed must speak for itself, and from it nothing can be gathered to support in any way defendant's assertions. The Judge, therefore, decreed the appeal of plaintiff.

Defendant appeals specially to this Court, urging three grounds.

On the first point, we consider the Judge's decision clearly wrong; for, if the plaintiff's plea of possession of the 6½ annas is proved to be groundless, his claim, so far as is founded upon that possession, can at most be for the 4 annas, and not for the 10½.

On the second point, we think that the Pandit, when, as it is admitted by both parties before us, the Mithilá law was to govern the case, should have supported his opinion by the books acknowledged as authorities of that law, such as the Viváda Ratnákara, Viváda Chintámani, Vyavahára Chintámani, the Smriti-sára, and other Mithilá works, (Vide Macnaghten's Preface, page 22,) and not as he has done by citations from the Mitákshará. It has been pressed on us, on the other hand, that the Mitákshará is of equal weight with the Mithilá Law Books; but, we think, where the special Mithilá law is clearly contemplated by the Court and the parties as governing the case, and that law has its own authorities, though they may happen to agree with the Mitákshará, they should be cited and acted on. Further, it has still more strongly been urged that the decision in Vol. II, Select Reports, Sudder Dewanny Adawlut, 28th July 1813, page 74, and that in Vol. VI, page 132, referring to the case in page 71 of Vol. VI, show that by the Hindoo Law current in the same district of Tirhoot, such alienations as this are valid. Without going into the details of the cases, we think it enough to remark that, to the east of the Gunduck, in one part of Zillah Tirhoot, the special Mithilá law prevails, and in that part to the west, another law, viz., the Mitákshará; and in fact, if we required more, to show the erroneous and incomplete nature of the bywastá in that case, it is to be found in the fact that a copy of a bywastá by the same Pandit, filed in this case, shows he has applied the penal Mithilá law, and held that under it alienations, by a father, cannot be made without the son's consent.

On the third point, the pleadings and the judgment of the Judge clearly show, that the plaintiff sued partly as son and partly as nephew, to set aside his father's and uncle's alienation, and that the uncle's alienation was not even referred to in the bywastá.

We would further remark that the Judge is in error in writing that a deed must always speak for itself. Its terms may and should, in many cases, be interpreted and explained by the surrounding circumstances of the case.

We remand the case to the Judge, to re-try it with reference to the foregoing remarks.—S. D. A. Dec., for 1859, p. 294.

Held that a nephew is not competent by Hindu Law to object to any alienation of ancestral property directly or indirectly made by his uncle.—*Gunga Deen Rawot* v. *Madhoo Soodun* and others. Agra Rep. Vol. III., A. C. p. 4.

CALCUTTA,—H. C. A.—*The 16th of September* 1872.

Before Sir Richard Couch, Kt., *Chief Justice,*
and Mr. Justice Ainslie.

BABOO NUND COOMAR LALL and another (Plaintiffs)
versus
MOULVIE RAZEEOODDEEN HOSSEIN and others (Defendants).*

BABOO NUND COOMAR LALL and another (Plaintiffs)
versus
SYUD RUZAOODEEN HOSSEIN and others (Defendants).*

BABOO NUND COOMAR LALL, and another (Plaintiffs,)
versus
MOULVIE ABDOOL LUTIF, and others (Defendants).*

In execution of a decree against A, a Hindu, living under the Mitákshará, his right, title, and interest in a certain property, part of which he had acquired as heir to his nephew and cousin, was sold. A suit brought by A's sons to obtain possession of their share of the property, on the ground that the debt for which the sale was held, had not been incurred under a legal necessity, was dismissed so far as it related to the part of the property which A had inherited collaterally.

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* Regular Appeals, Nos. 62 of 1871, and 41 and 42 of 1872, from a decree of the Subordinate Judge of Patna, dated the 30th December 1873.

According to the Mitákshará, a son cannot prevent alienation by his father of property which the latter has inherited collaterally. The restriction upon the father's power of alienation only applies to the grandfather's property.

Couch, C. J.—The plaintiffs in this suit are the sons of Laekram Lall, and the case in the plaint was that Laekram Lall held a share in the Mehal Jehangeer-pore Munkurpaul as ancestral property, two-thirds of which share were the share of the plaintiffs, and one third was the share of their father.

It appeared that of the share of 2 annas 1 d. 6¼c. held by Laekram, he directly inherited from his father or grandfather 12½d., and the remainder he inherited collaterally from the widows of two of his brothers and of a nephew.

Two questions were raised in the appeal: first, whether the sale of the plaintiffs' share was justified and was binding on them;—secondly, whether, if it was not, the plaintiffs were entitled to a decree in respect of the property which Laekram inherited collaterally.

There was no evidence how or for what purpose the debts which were said to have been paid off with the borrowed money were contracted. The evidence is altogether insufficient to establish a case in which a mortgage by a father of ancestral property would be binding on his sons.

It is therefore necessary to decide the second question, whether the plaintiffs are entitled to a decree in respect of the property which Laekram inherited collaterally. In the Mitákshará, Ch. I, s. I, v. 3, heritage is said to be "of two sorts, unobstructed, or liable to obstruction. The wealth of the father or paternal grandfather becomes the property of his sons or of his grandsons in right of their being his sons or grandsons, and that is an inheritance not liable to obstruction. But property devolves on parents (or uncles,) brothers, and the rest upon the demise of the owner, if there be no male issue; and thus the actual existence of a son and the survival of the owner are impediments to the succession; and, on their ceasing, the property devolves on the successor in right of his being uncle or brother. This is an inheritance subject to obstruction." V. 27 of the same section which was much relied upon in the argument for the appellant, where it says:—"Therefore, it is a settled point that property in the paternal or ancestral estate is by birth" must be considered to refer to inheritance not liable to obs-

truction; what is described in v. 3, as becoming the property of sons or grandsons in right of their being sons or grandsons. They do not by birth acquire a right in property to the succession to which by their father there is an impediment, and which he may never succeed to. V. 33 says:—"In respect of the right by birth to the estate, paternal or ancestral we shall mention a distinction under a subsequent text." In s. 5, v. 9, it is said:—"So likewise the grandson has a right of prohibition if his unseparated father is making a donation, or a sale of effects inherited from the grandfather; but he has no right of interference in the effects which were acquired by the father. On the contrary, he must acquiesce because he is dependent." And v. 10 is:—"Consequently the difference is this: although he may have a right by birth in his father's and in his grandfather's property, still, since he is dependent on his father in regard to the paternal estate, and since the father has a predominant interest as it was acquired by himself, the son must acquiesce in the father's disposal of his own acquired property; but since both have indiscriminately a right in the grandfather's estate, the son has a power of interdiction if the father be dissipating the property." According to these texts the restriction upon the father's power of alienation only applies to the grandfather's property, v. 8 and 11 of the same section confirm this, and so also does v. 5 of s. 5.

Doubts have been raised on this question by commentators, and the arguments on each side are stated in Colebrooke's Dig., Vol. II, Madras Ed., p. 274 where the author is of opinion that the rule of equal dominion vested in father and son only applies where the property has regularly descended. The state of the question is very well stated in West and Buhler, Bk. 2, Intro. p. 19:—"Ancestral property, as amongst descendants, comprises property transmitted in the direct male line from a common ancestor, and accretions to such property made with the aid of the inherited ancestral estate." Thus, in the case of a father, head of a family, property inherited from his father or grandfather, is ancestral property, however acquired by its previous possessors. On the other hand, property inherited by him from females, brothers or collaterals, or directly from a great-great-grandfather, appears to be subject to the same rules as if self-acquired. Ancestral property, in fact, may be said to be co-extensive with the objects of the *aprati-bandha-dáya* or unobstructed inheritance.

What appears to be the result of the text of the Mitákshará and the better opinion among commentators is supported by two decisions. In *Ráyadur Nallatambi Chetti* v. *Ráyadur Mukunda Chetti** it was held that a suit by a son against his father to compel a division of immovable property inherited by the latter from his paternal cousin could not be maintained. And in Jowahir Singh v. Guyan Singh†, it was held that a son cannot control his father's act in respect of a property, the succession to which is liable to obstruction; and it is only in respect of property not liable to obstruction that the wealth of the father and grandfather becomes the property of his sons or grandsons by virtue of birth.

We concur in these decisions. The decree of the Court below must be reversed as to two-thirds of 12½d. of the property in suit, and it must be decreed that the plaintiffs do recover two-thirds of 12½d. of the property claimed in the plaint, with mesne profits and costs of suit in proportion.

A similar decree will be made in the appeal No. 41 of 1872 between the same parties, and in appeal No. 42 of 1872 where the suit was against another purchaser.

Costs of the appeals to be borne by the parties in proportion. *Decrees modified.* B. L. R. Vol. X, pp. 183 and 188-193 and S. W. R. Vol. XVIII, p. 477.

A son cannot control his father's act in respect of the succession to which he is liable to obstruction. It is only in respect of property not subject to obstruction that the wealth of a father or grandfather becomes property of his sons or grandsons by virtue of birth.—Jowahir Singh v. Guyan Singh and others.—Agra H. C. Rep. Vol. IV, p. 78.

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* 3. Mad. H. C. Rep. 455. See Partition.

† 4 Agra H. C. Rep. 78.

BOMBAY, S. D. A.*—*The 19th of September*, 1839.

AMRUT ROW TRIMBUCK PEHTAY,
versus
TRIMBUCK ROW AMRUTAYSHWUR and another.

In this case, it was ruled that a son's share of ancestral property, specially appropriated for his maintenance, is not attachable in satisfaction of his father's debts, during the life-time of the latter.—Sel. Rep. p. 218. Morley's Digest, Vol. I, p. 44.

CALCUTTA, H. C. A.—*The 30th of January*, 1866.

Present:

The Honorable C. B. Trevor and F. A. Glover, *Judges.*

GOOR SURUN DASS, (Plaintiff,) Appellant,
versus
RAM SURUN BHUGUT and others, (Defendants,) Respondents.

According to the Mitákshará Law, sons have a vested interest in ancestral property, which interest is saleable at any time in satisfaction of claims against them.

This suit arose in this wise.—Chuttaree Bhugut, the original acquirer of the property, left two sons, Ram Suhae and Sheo Suhae—the first, who is now alleged to be *'non compos mentis,'* had sons, Ablakee and others; the last (who is dead), left also sons, Ram Surun and others. These sons of Ram Suhae aud Sheo Suhae borrowed money from, and executed a deed of mortgage to, one Maghessur Dyal on the 12th of November 1858, and he sold his interest to Goor Surun Dass, the plaintiff, in November of the following year.

Goor Surun foreclosed, and then sued for possession of the mortgaged property. He got a partial decree only, the sons of Ram Suhae being declared to have no right on account of their father's insanity. The plaintiff then brought his suit against Ablakee and the other sons of Ram Suhae for the money lent, and obtained a

* Present; Pyne and Greenhill, *Judges.*

decree on the 29th of May, 1863, which was confirmed afterwards by the Jugde on appeal.

In execution of this decree, Goor Surun prayed for the sale of his debtor's reversionary right in the ancestral estate then held by their father Ram Suhae Bhugut. This was refused by the Principal Sudder Ameen, and the present suit was brought to cancel this miscellaneous order, and to declare the debtor's right saleable.

The Lower Court has now decided that the rights in question are not 'existent,' but are contingent on an extremely uncertain event, that is, the survival of the father by the sons, and that they are not, therefore, legally saleable.

The decree-holder appeals against this decision, and urges that, according to the Mitákshará system of law which confessedly governs this case, sons have from birth a vested interest in ancestral property, and that such interest is saleable at any time.

There can be no doubt, we observe, that this is a correct exposition of the law as it prevails under the Mitákshará system, and that sons can, at their pleasure, force a father, however reluctant, to divide with them property obtained from a paternal grandfather, (*vide* Colebrooke's Mitákshará, Chapter I, Section 6). This right accrues to a son from the time of his birth, and is not, therefore, one contingent on the father's death, or upon any uncertain event; it is a vested right claimable at any time during the father's life.

It may be, as argued by the respondents' pleader, that no case of the kind is to be found in our books; but the principle is, we consider, indubitable, and we have no hesitation in declaring it. There is no necessity for our going further than this, or for stating the effect of our decision on the properties claimed.

It is sufficient for the purposes of this case that we lay down the general rule, as, with the exception of Sheo Surun, none of the respondents have appealed.

With reference, however, to this respondent who claims through his ancestor, Bhayabul Singh, to have purchased the entire right, both of Ram Suhae and of his sons, in Mouza Pachoonda before the passing of the plaintiff's decree, we think that the case must be remanded for enquiry.

For the rest, we reverse the decision of the Principal Sudder Ameen, and declare the sons of Ram Suhae to have a vested right

in the ancestral property, which is liable to sale in satisfaction of any claims against them.

The costs of this appeal will be paid by all the respondents except Sheo Surun Roy, whose case is remanded. The costs of that portion of the suit will follow the result of the enquiry now ordered. —S. W. R. Vol. V, page 54.

Admitted Legal Opinions.

Without the consent of his legitimate son, a man cannot alienate any part of his immovable property.

A widow having an adopted son cannot, without his consent, alienate any portion of the estate which belonged to her husband.

Q. 1. Is a landed proprietor at liberty, having a son born in lawful wedlock, to bestow his whole or a portion of his landed estate by gift to his son by a woman of another class, or to a stranger, without the consent of his legitimate son?

R. 1. "Though immovables or bipeds have been acquired by a man himself, a gift or sale of them *should not be made* by him, unless convening all the sons." "By favour of the father clothes and ornaments are used, but immovable property may not be consumed, even with the father's indulgence."

According to the above quoted texts of *Manu*, *Yájnyawalkya*, *Náreda*, and *Devala*, the father is incompetent to give, sell, mortgage or make other alienation of his bipeds and immovables, where a legitimate son is living, without his consent. The father is competent to make a gift to his illegitimate son sufficient to provide him with food and raiment, though there be a legitimate son alive.

Q. 2. Subsequently to the death of the Raja, his widow adopted a son and put him in possession of all the property left by her husband. Shortly after, she, without the sanction of her adopted son, assigned a portion of the estate, by a deed of gift, to a stranger. In this case, is such gift legal and valid?

R. 2. According to the doctrines of *Kátyáyana* and *Yájnyawalkya*, the widow is incompetent to make a gift, mortgage, or sale of any property, excepting such as she may have received from her affectionate kindred, without the sanction of her adopted son.

Bareilly Court of Appeal.—Macn. H. L. Vol. II, Chapter viii, Case 26.

An ancestral landed estate cannot be given to one son, to the exclusion of the sons of another son.

Q. A landed proprietor had two sons, the eldest of whom died, leaving two sons. Subsequently he (the proprietor) disposed of his entire ancestral estate, consisting of movable and immovable property, by a deed of gift in favor of his second son. In this case, is the gift legal or otherwise?

R. He is incompetent to make a gift of the immovable estate which devolved on him from his forefathers, to his second son, without the consent of his eldest son's sons, and the deed of gift is null and void. He is entitled to give jewels and other movables, though inherited from the grandfather. This is conformable to the *Vivâda-ratnâkara*, *Mitâksharâ*, and other authorities.

Authorities.

Yâjnyawalkya:—"The ownership of father and son is the same in land which was acquired by his father, or in a corrody, or in chattels."

"The father has no power to make an unequal partition, or to make a gift, of the ancestral property. This is the doctrine of the *Vivâda-ratnâkara*."

"They who are born, and they who are yet unbegotten, and they who are still in the womb, require the means of support: no gift or sale should, therefore, be made."

Yâjnyawalkya:—"The father is master of the gems, pearls, and corals, and of all other movable property: but neither the father nor the grandfather is so of the whole immovable estate."

Zillah Bhagulpore, April 7th, 1819.—Macn. H. L. Vol. II, Chap. viii, Case 3.

Sale of a man's entire property allowable under what circumstances.

Q. Can a person, having a son, a daughter, and a wife, sell his whole ancestral landed estate to a stranger?

R. If a father, having sons and other heirs, sell his entire patrimonial immovable property without their consent, or without extreme necessity, such as to render the sale necessary for the purpose of the family support, the sale is void and illegal; but under such necessity the act is allowable. This opinion is conformable to the *Vivàda-chintàmani, Vivàda-ratnàkara, Vivàda-chandra,* and other authorities.

Authorities.

Cátyáyana:—"A wife or a son, or the whole of a man's estate, shall not be given away or sold without the assent of the persons interested; he must keep them himself; but in extreme necessity, he may give or sell them *with their assent;* otherwise, he must attempt no such thing: this has been settled in codes of law. Except his whole estate and his dwelling-house, what remains after the food and clothing of his family, a man may give away, whatever it be, *whether fixed or movable;* otherwise it may not be given."

"If the sons and the family cannot be supported without selling the whole real estate, or if the father, reserving such portion as may suffice for the maintenance of the family, sell the entire patrimonial landed estate, the sale is good and legal."

Dáya-bhága:—"But if the family cannot be supported without selling the whole immovable and other property even the whole may be sold or otherwise disposed of."

Zillah Nuddea, May 12th,* 1817.—Macn. H. L. Vol. II, Chap. xi, Case 22.

The gift of a man's own acquisition is valid, though made on his death-bed, if he was of sound disposing mind at the time.

Q. A Hindu, having a uterine sister's son living, made over his entire estate, consisting of movable and immovable property, which he had acquired by dint of his own industry, by gift to a woman

* Although this is a *Bengal* case, yet the opinion delivered in the reply seems to be according to the other schools, and not of the Bengal school, where a father has absolute power to dispose of property immovable as well as movable, ancestral as well as acquired, without the consent, nay to the prejudice, of his son and son's son.

whom he kept as a concubine. At the time when the deed of gift was executed, he was afflicted by illness, which terminated in his death two days afterwards. In this case, is the gift legal; or supposing it to be void and illegal, will his entire property devolve on his sister's son?

R. Supposing the person alluded to in the question to have made over his self-acquired real and personal estate by gift to his concubine while his uterine sister's son was living, and presuming him to have been, at the time when the deed was executed, of sound disposing mind, in that case the alienation is good and valid; otherwise it has no validity, and the sister's son will inherit*.

Manu says: "He may give it away at his pleasure, or he may defray his expenses with such wealth†."

Nareda: "Though *generally* his own master, what a man does while disturbed from his natural state of *mind*, the wise have declared not done, because he is not *then* his own master."

Patna Court of Appeal.—Macn. H. L. Vol. II, Chap. viii, Case 39.

A gift by a father of his entire property to one daughter is legal, though he may have another daughter, and brother's son.

The other daughter, if unmarried, is entitled to have the expenses of her nuptials defrayed.

Q. 1. A person having two daughters, a brother's son, and a son who was an outcast, verbally conferred his entire estate, consisting of movable and immovable property, on one of his daughters. In this case, is the gift good and legal?

R. Supposing that the person alluded to, through paternal affection, verbally alienated his whole landed and other property to one of his daughters, while his other daughter, a nephew, and an outcast son were living, the alienation is legal, and the persons above

* This opinion, and the one which preceded it to the like effect, must be received with some degree of qualification. It has been laid down as a general principle by Mr. Colebrooke, in his treatise on Obligations and Contracts, Book IV, § 645, that "by the Hindu law, a gift or gratuitous contract, made by a person afflicted with an incurable distemper, is void. His equanimity being disturbed, he does not possess the self-control requisite to a valid act and legal disposal of his property." It follows, that to uphold a gift, made on a death-bed, there should be the clearest proof of sound disposing mind, to repel any presumption which might exist to the contrary.—Note by Sir W. Macnaghten.

† This text is not of *Manu*, but of *Vrihaspati*.

named have no right to the property, as is laid down in a text of *Yájnyawalkya*:—"They who know the law of gifts declare, that things once delivered, as the price of goods sold, as wages, for the pleasure *of hearing poets, musicians, or the like,* from natural affection, as an acknowledgment to a benefactor, as a nuptial gift to a bride *or her family,* and through regard, cannot be resumed.*" This is conformable to the *Mitákshará* and other authorities.

Q. 2. Supposing the gift to be illegal, and the outcast son dead, and that there are two daughters and a brother's son of the donor living, which of these survivors is entitled to the inheritance?

R. 2. Whatever property is given to a daughter, the gift is legal; for it insures the production of benefits, as *Vyása* says: "A gift to a daughter is productive of an eternal enjoyment of benefit, and also to a brother."—The other survivors have no right of succession; and if the other daughter be a maiden, she is only entitled to such portion of the property as may suffice for the necessary expenses of her nuptial ceremony.

Zillah Agra, March 9th, 1813.—Macn. H. L. Vol. II, Chap. viii, Case 43.

Responsa Prudentum.

NACHARUMMAH and another, *v.* SASHUMMAH and another.

The deceased Venganah, besides his son Singree, left surviving him the defendant Sashummah his wife, a daughter, two daughters-in-law, and a fraternal sister-in-law,—all widows. In his last illness he directed that after his death, a certain sum with his accounts and bonds being first given to his son, the residue of his property should be divided equally between him and the five widows. This was accordingly done; and the son having since died, the two daughters-in-law, above alluded to, claim to be entitled to share what he has left, as against the defendant Sashummah, the mother of Singree deceased. Qu. as to their right?

* This is not a text of *Yájnawalkya,* but of *Nárada.* See Dig. Vol. ii. p. 291.

Answer.

The deceased Venganah, having a son, had no right to make the distribution stated.

Remarks.

By law, as received in the school that follows the *Mitákshará*, *Smriti-Chandriká*, and *Mádhavya*, a father is restrained from giving away *immovables*, without the concurrence of his sons: but he is not precluded from disposing of *movables* at his discretion. (Mit. on Inh. Ch. i. Sect. 1. § 27.) Considered then as a gift, the distribution alluded to, which seems not to have concerned land, should not have been deemed invalid. No doubt, the mother (and not the sisters-in-law) was entitled to succeed to the son's property.

Stra. H. L. Vol., II, (2nd Ed.) pp. 8 and 9.

ZILLAH OF SARUN.

(A) RAM TUWUKUL TEVAREE, (B) LAL RAM TEVAREE Appellants,

versus

(C) Four sons of CHUTTUR TEVAREE, (D) ICO LAL TEVAREE Respondents.

Ruggoo Nath, deceased, was the father of A, C, and D. A is the father of B. It appears that C and D having instituted in the Zillah of Sarun a suit against A and B, claiming certain lands on the ground of their having been assigned to A by deed in writing by their father Ruggoo Nath, contrary to the Shástra, obtained a decree in their favor by the decision of the Registrar, which was confirmed in appeal by the Assistant Judge. The appeal of A and B to the Provincial Court not being admitted, they petitioned the Sudder Dewanny Adawlut for a special appeal; upon which that Court referred to their Hindoo Law Officers the following questions, arising from the case as above stated, with the pleas urged by the appellants.

1. Supposing Ruggoo Nath to have acquired the lands in dispute by means of ancestral property, could he in that case, assign them by deed to one of his sons, to the exclusion of the others?

2. Supposing them to have been not ancestral, but of his own acquisition, could he do so ?

In answer, the Pundits replied,

That, under the circumstances stated, the father, in either case, was not competent to assign over, by any means, the lands in question to one son, without the consent of the others ; a father not having power either to give or sell without the consent of his sons, whether land or slaves, though acquired by himself, much less where they have descended to him. And for this they referred to the text of Manu, cited in the Mitákshará, Vyavahára Mádhavya, Vira Mitrodaya, Vyváda Tándava, &c. &c.

Communicated by Mr. Sutherland.—Stra. H. L. Vol. II, (2nd Ed.) page 10.

LATCHEME-NADA, *v.* VISVA-NADA S.—

The Defendant, and the husband of the Plaintiff being brothers, and undivided, and their mother dying, the defendant, in the absence of his brother, made a gift of land on the occasion of her death, equal to two *mercalls* of seeds, to one Annavaraloo Sashumbuttoo; he, the Defendant, being at the time in possession of the family property. *Quest.* Was the gift good as against the absent brother, unauthorized by him ?

Remarks.

See Mit. on Inh. Ch. I, sect. i, § 28, 29. The gift being made for the spiritual benefit of a mother's shade, and, so far as appears, being not excessive for that purpose, according to the religious notions of the parties, seems to come under the description of indispensable duty, for which one brother is competent to make a valid gift, without the consent of the other,—it could not, therefore, be re-called. The action, however, does not appear to have been brought for this purpose, the donee being no party to the suit ; but for that of charging the whole gift against the donor's share of property ; in which view also the maxim cited from the Mitákshará is adverse to the Plaintiff's claim, which goes to disallow this disposal of property as for the common concern. C.

It may be remarked, in addition to the observations, that, had the Plaintiff's husband been a minor at the time of the grant in question, it would have been clearly good, without his consent, which he would not, during minority, have been competent to give. (Mit, on Inh. Ch. I, Sect. i. § 28, 29.) It does not appear that he was a minor; but it is stated that he was absent at the time, which would be equally material, as connected with the occasion of the grant; being the death of the mother, whose ceremonies could not conveniently wait. Minors and absentees stand, in many respects, in point of Hindu law, on the same footing. T. A. S.

Stra. H. L. Vol. II, (2nd Ed.) p. 339.

TEROOVANDE-PORAM CHRISHNAMA-CHARIAR, By his Vakeel, SESHADRU IYENGAR,

versus

ALAMALAMMAN, by his Vakeel, SYED KUSSEEMOODEEN CAWN.

We send you copy of the genealogical table in this cause; and you will let us know which of the parties is to be considered as heir. If the proprietor of a property authorize another to take possession of it, and perform his funeral ceremonies after his death, and die, leaving an heir at law, is the latter thereby disinherited?

Answer of the Pundit.

The gift by the owner in his life-time was competent; and takes effect upon his death.

Remarks.

This is a consequence of the power of *giving*; which is not restrained, unless in the case of land, the owner having male issue living; or in that of the whole property, leaving the family thereby destitute (Jagan-nátha's Digest, Book II, Ch. iv, ver. 4, 5, 7, 9, 14, 18.) According to the Smriti-Sára, cited by Jagan-nátha, (Vol. ii. p. 118.) a gift of the whole estate is valid, but sinful. In the case of land, however, the gift would be invalid, if the heir were a lineal male descendant, and did not consent. Mit. on Inh. Ch. I, Sect. i, § 27. C.

Stra. H. L. Vol. II, (2nd Ed.) pp. 5 and 6.

ZILLA OF VIZAGAPATAM.—*17th of December*, 1808.

The family of the deceased, a Hindoo of the Banyan tribe, consisted of his wife and the widows of the two sons dead without leaving issue; when, being at the point of death, he caused to be drawn two instruments under two several dates, purporting, that nothing should be given to his elder daughter-in-law, except the jewels she had worn during the life of her husband; but that the younger one should have some of the movables, besides her ornaments; and that all the rest of his property, movable and inmovable, should belong, in certain specified proportions, to his blood relations, his servants, and his widow.—Are these instruments valid? And, if not, in what manner are the three widows, *i. e.* the widow of the deceased, and his two daughters-in-law, living together, to divide the estate?

Remarks.

A disposition of property made under influence of anger, as of any other violent passion, disturbing the intellect, is by law invalid. But the objection must appear from other circumstances than the mere fact of the diposition being different from that which the law would have made without it. The whole property in question was vested in the father, and he, having no surviving male issue, was not restricted by law from disposing of immovables, as well as movables, at his discretion. Whatever was not so given away by him would devolve by inheritance on his widow, and, after her death, on his legal heirs; and, according to an opinion which is supported by the author of the *Vaijayantí*, a commentary on Vishnu, the widows of sons, who died before their father, are entitled to succeed to him. But this doctrine, on which alone the daughters-in-law could found any pretensions to participate, is not generally received in the schools which follow the Mitáksharà. C.

Stra. H. L. Vol. (2nd Ed.) pp. 14 and 15.

ZILLA OF CHITTORE.—*17th of December*, 1810.

The *Calendar** of a village adopted a son, who married, and died, in the life-time of his father. The father subsequently died, having previously to his death given his *meerasee* in trust, for the support of a daughter, a sister, and the widow of his deceased son, who were all living with him at the time. And now the daughter-in-law claims it as hers. The Pundit (Ausoory Alagasingara Charloo,) reported, that the disposition by the Calendar was a competent one, and the claim set up by the daughter-in-law not maintainable.

Remarks.

There was nothing in the law to prevent the man disposing of his property by gift, (which this trust is) for the support of the women, in any manner he judged proper. And even, had he made no such gift, still, according to the doctrine prevalent in the school of Mitákshaiá, the daughter would have inherited, in preference to the son's widow; though the author of the *Vaijayantí*, and a few other writers, hold otherwise. C.

Stra. H. L. Vol. II, (2nd Ed.) p. 234.

* The *Calendar* is he to whom belongs, in villages, the function of reading and expounding the *Punchánga*. *Punchánga* (compounded of *puncha*, five, and *unga*, members,) signifying a book treating on astrological subjects, under five particular heads. It is the province of Brahmins. Every Hindoo village has one, who receives, as his compensation, a portion of the produce, which is called his *meerasee*. In some villages it is hereditary.

SECTION II.

THE SUPREMACY AND CONTROL, OF THE FATHER OVER FAMILY-PROPERTY, AND, IN CASE OF HIS ABSENCE, DISABILITY, DEMISE, OR ABDICATION, OF HIS ELDEST OR ANOTHER SON QUALIFIED.

CALCUTTA, S. D. A.—*The 11th of June,* 1850.

Present:

Sir R. Barlow, *Bart,* W. B. Jackson and J. R. Colvin, Esq., *Judges.*

Case No. 3 of 1849.

CHUTTER DHAREE LAUL, Appellant, (Defendant with others, absent in appeal,) *versus* BIKAOO LAUL, Pauper, (Plaintiff,) Respondent.

It is not competent to a son, even in the provinces where the law of the Mitákshará prevails, to bring a suit for possession of an ancestral estate, and mutation of names, as on exclusive proprietary right during the life-time of his father, on the ground that the father had made an illegal alienation of the estate by a sale without the son's consent, and that not only was the sale illegal on that account, but that the father had, by making it, divested himself of his own interest in the estate. A former decision by a single Judge of the Court, to the contrary effect, overruled.

The Principal Sudder Ameen's decision is, in substance, as follows:—"Plaintiff sues for possession, partition and registry of property, as detailed below, and for *wasilat* thereof, estimating the value of the suit at 5,101 rupees.—*First,* For his share in mouzahs Deoree and Dhunkee, pergunnah Gho, purchased by Chutter-dharee Laul, appellant in case No. 3.—*Second,* For a similar share in mouzah Seeora, pergunnah Cherand, purchased by the appellant in case No. 22."

"The defendants plead that the plaintiff's father sold to them his property, with plaintiff's consent, in order to pay off debts contracted for the expenses of the marriages of his daughters and sons; that, at the time of the sale, the plaintiff was present at the execution of the deed with his father, and engaged with him in completing the sale. He, however, made no objection to the sale, either at the time of mutation or registry of the deed."

"On the other hand, it having been clearly proved by the decisions and other documents filed by the plaintiff, that plaintiff's father was a bad-character, and alienated the disputed property which was ancestral; that plaintiff objected to the sale at the time of mutation, and that plaintiff's father cannot, under the Mitákshará, sell or alienate ancestral property, without the consent of his son. It is, therefore, ordered, that the case be decreed in favor of the plaintiff."

Judgment—

Appellant proceeds to argue the case as to the sale of village Dhunkee; and urges that, whether the sale be good or bad, during the life-time of his father, the plaintiff has no title to possession, nor even to come into court to claim such possession; and further, that the mother of Nund-koomar is still alive; that Gobind Shevuk may have other children; and, in such case, the division between the plaintiff and his half brother Nund-koomar, in half shares, would prejudice the rights of other children born subsequent to that division, which, of itself, preclude the Court from granting a decree to the effect now sought.

In answer, it is pleaded that a father and son possess an equal right in ancestral immovable property (see page 75, Select Report, Sudder Dewanny Adawlut, Volume II., Sham Singh, appellant, *versus* Musst. Omraotee, respondent*); and it is argued that as the father by making the sale, has divested himself by his own act of his right, the plaintiff is the only legal claimant to the property in suit.

On these points, we have to observe that a suit for possession and mutation of names, as on exclusive proprietory right, is the suit before us, not a suit to declare the sale by father of ancestral property, without consent of his son, to be illegal.

We are clearly of opinion that, during the father's life, the plaintiff cannot institute such an action as is now brought. We, therefore, reverse the decision of the lower Court, and give judgment in favor of the appellant with costs. The respondent's pleader has produced as a precedent in support of his case, the Report at page 175 of the Sudder Decisions for 1845, wherein it was

* Ante page 44.

ruled by a single judge (Mr. Rattray) that a plaint, similar to the present, is admissible, and a decree in concurrence with that of the Principal Sudder Ameen was passed for Ram Gholam, the plaintiff. We, however, cannot concur in the principle of that decision.—S. D. A. Dec. for 1850, p. 282.

CALCUTTA, H. C. A.—*The 3rd of May*, 1867.

Present:

The Honorable H. V. Bayley and Shumbhoo-nath Pundit, *Judges.*

Case No. 2527 of 1866.

SHEO RUTTUN KOONWUR, (Defendant,) Appellant,

versus

GOUR BEHAREE BHUKUT and others, (Plaintiffs,) Respondents.

Where one member of a joint family claims a property as separate, the *onus* is on him to prove his allegation.

Under the Mitákshará law, an alienation by a son without the father's consent is invalid.

Bayley, J.—The pleas taken in special appeal are, in our opinion, valid.

These pleas are that the burden of proof has been wrongly put by the Lower Appellate Court upon defendant, special appellant, and that the alienation by one brother without the direct participation of the father and in his life-time was invalid.

Plaintiff sued for a house at Bhagulpore, alleging title by a purchase from Gopee and Laul Beharee, the sons of one Luchmun. The original purchase was in the name of *Gopee* alone. Defendant is an auction-purchaser at a sale in execution of the rights and interests of Luchmun, the father, and Laul Beharee, the son, both judgment-debtors.

The Lower Appellate Court, admitting that the family lived jointly at Mirzapore, states that it is not shewn by defendant, special appellant, that the house at Bhagulpore was connected with the joint family or otherwise than separate.

But with the presumption arising from the status of the family being admittedly joint, it was not on defendant, but on plaintiff who sued for the house at Bhagulpore as a separate property, to prove that it was so.

Nor could the property be alienated under Mitákshará law by the sons without the consent of the father then living.

We, therefore, decree this appeal with costs. We reverse the decision of the Lower Appellate Court, and remand the case to be tried with reference to the above remarks.—S. W. R. Vol. VII, p. 449.

BABJEE BALLAL, *v.* RAMAJEE NARAYUN KURMUKUR.

In this case the Kulkarn of a village was sold to the respondent by the owner with the consent of the co-parcener (appellant's father,) then absent, and the respondent was ousted of possession by the appellant; it was held that the sale was good as against the appellant, his father being allowed a right of action to set aside the alleged sale, if false.—Borr. Rep. Vol. II, p. 642. See Morley's Digest, Vol. I, p. 44.

Alienation made by a Hindú with the consent of his son, cannot, under the Mitákshará, be questioned by the grandson.—*Burraik Chutteo Sing and another* v. *Gridharee Sing and others.* S. W. Rep. Vol. IX, p. 337.

A deed of sale (where full consideration is paid) executed by a member of a Hindú family, acting *de facto* as the guardian of his minor brothers, is not valid by reason of the father being alive at the time.

Where a guardian sells part of an estate, and applies the purchase-money to the expenses incurred in a suit undertaken and found in fact to be for the benefit of the whole property, the sale is valid.—*Gunga Pershad and others* v. *Phool Singh and others.*—S. W. Rep. Vol. I, p. 106.

Admitted legal opinions.

Partition without the father's consent is illegal. But with his consent binds him, though absent at the time. And without his consent does not bind the son who made it.

Q. 1. A person had three sons, the youngest of whom absconded from his family house, and the father went towards Bindrabun to make inquiry after him. His other two sons remained at home. In this case, is the eldest son competent to exercise proprietary right over the landed and other property? Supposing the eldest in this interval to have adjusted the proportion of his father's share of the joint property by means of arbitration, in this case, is the adjustment complete and binding?

R. 1. In the absence of the father, who proceeded to Bindrabun to inquire after his missing son, the eldest son is competent to manage his assessed lands and his other property, in virtue of which he may exercise proprietary right over it*. But any partition of joint property made by means of arbitration without the father's permission, cannot be considered as lawful.

Q. 2. If the father, at the time of his proceeding to Bindrabun, verbally left directions with his eldest son to adjust the dispute regarding his share of the immovable property held in joint tenancy with his other co-heirs, and he (the eldest son) accordingly did so while he was absent, and the father upon his return be not satisfied with the adjustment, in this case, is such adjustment good and binding?

R. 2. Supposing the eldest son, in the absence of his father, but with his permission expressed at the time of his proceeding to Bindrabun, to have chosen an arbitrator, and to have received

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* It should not be supposed, from the doctrine laid down in this case, that according to the Hindoo law it is a settled maxim, that the eldest son is alone entitled to manage his father's estate, and that the other sons are to be debarred from the management. The law authorizes a capable son, whether he be eldest or youngest, to manage the estate; but if each son claim his share of management, he is competent to do so. A son who is capable may assume the management, with the consent of the rest, during the father's absence or at his death, as appears from the subjoined extract of the *Dáya-bhága*; "Is not the eldest son alone entitled to the estate, on the demise of the *co-heirs*, and not the rest of the brethren? Not so; for the right of the eldest (to take charge of the whole) is pronounced dependant on the will of the rest. Thus *Nareda* says: "Let the eldest brother, by consent, support the rest, like a father; or let a younger brother, who is capable, do so: the property of the family depends on ability. By consent of all, even the youngest brother, being capable, may support the rest. Primogeniture is not a positive rule."—Note by Sir W. Macnaghten.

his legal share of the joint property, separated by means of arbitration, such partition of the estate is good and binding, even though the father after his return wish to recede from it.

Q. 3. A person had an only son, who in the absence of his father having chosen an arbitrator, caused a partition of his father's ancestral immovable property which was held in joint tenancy with his other co-heirs; and the father having returned home dissented from the measure, and shortly after died. The son who caused the partition is still living, and wishes to recede from it. In this case, is he competent to do so, or otherwise?

R. 3. The partition of the father's joint immovable and other property made by the award of an arbitrator, during the father's absence, without his express permission, and to which the father after his return did not consent, is illegal, and on the death of the father, if the son who caused it to be made wish to recede, it cannot be considered as good and binding.

Zillah Midnapore, May 25, 1818.—Macn. H. L. Vol. II, Chap. V, Case 4.

Responsa prudentum.

SOOBUMMAH, *versus* GINECAPAH.

On a question, as to the liability of the son to be sued, on account of property claimed by the father, the father living and amenable at the time, the Pundit (Rungachary) certified in the negative.

Remarks.

A son can only sue, or defend a suit for his father, unauthorized by him, if the latter be disabled by decrepitude, disease, alienation of mind, or the like. See a passage of *Vrihaspati*, as follows: "A kinsman (explained by Mitra Misra to mean a son, or other near relation,) or any person who is delegated by the party, may institute or defend causes on the part of one who is an idiot, a madman, an old man, or one afflicted with disease."—If the father have retired from worldly affairs, the whole management of the family devolves on the son; and in such case he may of course be sued. C.

Right.—The father has absolute dominion during his life; the children have nothing to do with the property, or the claims on it, till after his decease. E.

Stra. H. L. Vol. II, (2nd, Ed.,) p. 326.

MADRAS, S. D. A.

If a Hindoo die, leaving property, can his eldest son, being of age, claim the outstanding balances due to his father, without previous application for the purpose to the co-heirs?—Or, must he obtain a *Vakalut-namah* from them, to empower him?

Answer.—The elder brother should consult, on the occasion, such of his younger ones as are of age at the time.

Remarks.

An elder brother may certainly take the management of the whole, with the acquiescence of the co-heirs; (Mit. on Inh. Ch. I, Sect. iii, § 3; and 2 Dig. text ix.) And if the objection be on the part of a debtor, pleading the claimant's want of authority from his co-heirs, the plea would be bad; though it is presumed that, if he require, for his satisfaction and security, that all should join in an acquittance for payments made by him, he ought to have that satisfaction. If the objection be on the part of the co-heirs, the elder brother (no doubt) cannot act for them, against their consent. C.

"Should consult," &c.—That would be very proper; but what answer is this to the Court's question? It was meant to ask, whether it be necessary that the elder should receive a formal commission from the other brothers, or whether he may act without it? The answer is that no formal commission is necessary. The elder brother succeeds naturally, as the representative of the father, to the administration of the estate; but, by common consent, any of the others may do so. In the latter case, a written agreement may be given; but the necessity of one is not even here absolute: the general notoriety of the fact is in all cases sufficient. E.

Stra. H. L. Vol. II, (2nd Ed.) p. 331.

SECTION III.

ON THE POWER OF A FATHER, OR ANY CO-PARCENER, OVER PROPERTY UNDIVIDED, OR DIVIDED.

CALCUTTA, S. D. A.—*The 27th of May,* 1826.

Present:

W. Leycester and W. Dorin, *Judges.*

SHEO SURUN MISSER (son and heir of SINGH LAUL *alias* DURIAO MISSER, deceased) Appellant, *versus* SHEO SUHAI, Respondent.

Sale of joint landed property, situated in the district of Mirzapore, by one partner without the consent of the rest, set aside as being contrary to the Hindoo law, and there being evident over-reaching on the part of the purchaser.

This was an action brought by Sheo Surun Misser against Sheo Suhai, to recover possession of two mouzas situated in zillah Mirzapore, pergunna Aroura.

The defendant, *in formâ pauperis,* replied that the land was worth more than Rs. 5,000, and was the joint property of his father and his four uncles. Had he wished it, he could not have alienated the land during their lives. He never executed any *kut-kubâlah* or written obligation, such as described in the plaint. He never received any of the sums spoken of by him, nor petitioned the Court to give the plaintiff possession. The real case was this: he was at a loss for money to pay the Government revenue for the year 1224 F. S., and therefore executed a written obligation of the nature of a mortgage deed, pledging the land for the sum of Rs. 1,000.

The officiating Judge of the Zillah passed a decree in favor of the Plaintiff with costs, directing the plaintiff to pay the defendant Rs. 2,056, the rest of the purchase-money. The defendant appealed, *in formâ pauperis,* to the provincial court of Benares, part of the judgment delivered by the First, Second and Officiating Judges of that Court is as follows:—"The appellant's father being alive, he (the appellant) had no right or power to alienate any part of the land, and all the deeds executed with that view, or to that effect, are

words. We therefore reverse the decision of the lower court and give a decree for the appellant with costs." From this decision the case was brought by special appeal into the Sudder Dewanny Adawlut.

The Chief and Fourth Judges of the Sudder Dewanny Adawlut (W. Leycester and W. Dorin) on the [illegible] of May [illegible] recorded their opinions as follows. The Hindoo law as laid down in [illegible] referred to in former cases* does not permit alienation of land, held jointly by several puttee-dars, or owners, to be made by one without the assent of the others nor indeed does such alienation hold good for the alienating partner's individual share even, without the assent of the rest. It is not in the present case sufficiently shown that the partners had consented to such alienation, as the appellant has attempted to prove. And even had their assent been shown, there was such evident overreaching on the part of the appellant, that the Court could not hold the transaction valid, though at the same time the respondent was clearly bound to refund to the appellant the money he had received, with interest. For these reasons the decree was affirmed with costs.—Sel. S. D. A. Rep. Vol. IV, p. 158. (New Ed. p. 201.)

According to the Hindoo law, as current in Behar, an only son cannot be given or received in the Duttaka form of adoption,† and according to the same law, neither joint property nor the profits arising from sacrificial fees are fit subjects of transfer. *Nund-ram,* and others, heirs of *Ram Sunhye Pandey,* Appellants, v. *Kanhua Pandey* and others, Respondents.—Sel. S. D. A. Rep. Vol. III, p. 232. (New Ed. p. 310.)

A, B and C were brothers, sons and tenants in common of some ancestral lands. A, several years before his death, by deed, gave his general estate to D, his sister's son, and had his name recorded. On his death, B and C sued for A's interest in the undivided lands and also for his personal estate and certain villages bought in A's

* See Civil Reports, page 232, Vol. III, and page 71, *et passim*, of the present volume. The same doctrine was also maintained in a Tirhoot case wherein Raja Bydianund was appellant against Jydutt Jha and others, respondents. The Pundits then also held the sale of joint undivided property to be invalid, without the assent of all the sharers, and not valid even for the seller's own share, while undivided.—Note by the Register of the Sudder Dewanny Adawlut.

† This case will be found in extenso in the Book on Adoption.

name, which they alleged must be held to be an accretion to the ancestral estate. S. D. A., affirms judgment of Lower Court, passed on an opinion of its Pundit. This awarded right of B and C to A's share in the common villages, because, undivided,—and gift therefore, thereof, illegal. It dismissed claim to rest, because,—sole acquisition (on presumable admission of plaintiffs) was inferrible,—and continued adverse possession of donor and donee established.

Where B and C impugned as illegal a gift by A to D made several years before his death,—It was held that on A's death, B and C might recover, by suit, object of such illegal gift,—their right then accruing: so that, there was not adverse possession in A's lifetime, nor waiver of claim on the part of B and C by previous omission to sue.—*JivanLaul* and others v. *Ram Govind Singh* and others.—Sel. S. D. A. Rep. Vol. V, p. 163. (New Ed. p. 193.)

AGRA, S. D. A.—*The* 16*th of April* 1864.

Present:

W. Edwards, Esq. *Judge*, and W. Robert, Esq. *Offg. Judge.*

TOTA RAM and others, (Plaintiffs,) Appellants,
versus
PEETUM and others, (Defendants,)
Respondents.

Held that a property which has once been declared to be family-property, belonging to a Hindoo undivided brotherhood, must follow the conditions of such estates under Hindoo Law, and no sharer is competent to alienate his rights without having obtained the consent of the brotherhood.

This was a suit for declaration of right to one-half of 15 biswas 15½ biswansees, belonging to Peetum and Ram Chund, who died childless, and for prohibition of division by cancelment of a sale-deed in favor of Chotay, to which property the plaintiffs, appellants, became entitled under Hindoo Law and custom on the demise of their father.

In appeal it is urged that as the Judge admits that the share of one brother dying childless was divided among the family under a *Vyavasthá*, he should have found that the sale of their rights by

[illegible] the said sale was illegal and that those rights were [illegible] subject to division among the surviving members of the family.

Judgment.—

We admit the validity of this plea. The estate by the decision in the suit instituted by [illegible] was definitively settled to be joint family property. It has since remained in the same condition undivided, and must consequently follow the conditions of such estates under the Hindoo Law, by which a sharer in an undivided estate held conjointly, is incompetent to alienate his share without the consent of the members of the brotherhood. Under this view, the sale by the brothers Pestum and Ram Chund to Chotay, the fifth brother, was clearly illegal. We accordingly cancel the same, and reversing the decision of both the Lower Courts and decreeing in the (plaintiffs', appellants' favor, decree this appeal with costs.—*Agra, S. D. A. Dec., for 1864, p. 387.*

CALCUTTA, H. C. A.—*The 23rd of April* 1866.

Present:

The honorable F. B. Kemp and W. S. Setton-Karr, *Judges.*

Case No. 207 of 1866.

SHEO PERSHAUD JHA and others, (Plaintiffs,) Appellants,

versus

GUNGA RAM JHA and others, (Defendants,) Respondents.

A suit by the guardian of minors to set aside an alleged alienation made by the adult member of a joint Hindu family in collusion with the purchaser, and without the consent of his wards, is not premature.

According to the Mithila law, such a sale is void for want of the consent of the whole of the heirs, and in the absence of proof that the sale was made for a legal necessity or for the benefit of the minors.

This suit is not premature, as contended by the pleader of the special appellant. The guardian of the minors sues to set aside

an alleged alienation made by the adult member of a joint Hindoo family in collusion with the purchaser and without the consent of his wards. Such suit, in the discharge of his trust as guardian, can by no means be termed premature.

Whether the special appellant is entitled to a refund of his purchase-money from the adult members of the family is a point which we are not called upon to decide in this appeal.

The Principal Sudder Ameen did not, as contended, refuse to consider the evidence, on the ground that there was no recital of a legal necessity in the deed of conveyance. The Principal Sudder Ameen did consider the evidence, and observe that it was rendered suspicious by the absence of any recital in the bill of sale. It is admitted that the sale is void under the Mithila law for want of consent of the whole of the heirs; and there is no proof that the sale was made for a legal necessity or for the benefit of the minors.

The appeal is dismissed with costs and interests.

This decision governs No. 208, which is also dismissed with costs and interest.—S. W. Rep. Vol. V, p. 221.

It is the firmly settled rule of Hindú law, resting upon the authority of the Mitákshará and repeated in judicial decisions that a managing co-parcener has not the capacity to alienate or charge the share of his minor co-parcener in immovable ancestral property except for the purpose of providing for some family need or the performance of an indispensable religious duty, or except the alienation or charge be for the benefit of the joint estate.—Mad. H. C. Vol. VI, p. 371.

The incapacity of joint owners confers powers of alienation in certain cases of necessity upon the managing owner.—*Koer Sheopershad Narain* v. *the Collector of Monghyr* and others.—S. W. R. Vol. VII, p. 5.

A brother acting as manager of the family property and for the benefit of the minors, although he has not obtained a certificate of guardianship under Act XL of 1858, may make a temporary alienation of the family property for necessary purposes and the benefit of the minors.—*Lalah Sectul Pershad* v. *Chand Khan.*—N. W. Rep. Vol. II, p. 428.

[illegible] managing member [illegible] [illegible] of the ancestral [illegible] for the [illegible] of the family. [illegible] —[illegible] [illegible] p. [illegible]*

The manager of an undivided estate [illegible] the shares of [illegible] —[illegible] v. [illegible] and others.—Sel. S. D. A. Rep. Vol. V, p. [illegible]

[illegible] ancestral property [illegible] legal necessity for the [illegible] and such necessity [illegible] from the [illegible] and general character of [illegible] —[illegible] v. [illegible] Singh and others.—[illegible] Vol. VIII, p. [illegible]

It was held that by the law as current in Tirhoot the sale of joint undivided property is invalid without the consent of all the sharers, [illegible] that such sale was not valid even for the [illegible] share [illegible] —*Rajah [illegible] Kunwar v. [illegible]*.—Sel. S. D. A. Rep. Vol. IV, p. [illegible] note.

Held that by the Hindú law as current in Tirhoot the sale of joint undivided property, without the consent of all the sharers is invalid.—*[illegible] Lall and others v. [illegible] Lall and others.*—Sel. S. D. A. Rep. Vol. VI, p. 17[illegible].

Where the validity of a sale of ancestral property is objected to on the ground that it was effected without the consent of all the members of the joint Hindú family, the objection can only be made by the member who did not consent.

A member of a Hindú family may mortgage his undivided share of the joint property without the consent of his co-sharers, in order to raise money for the benefit of the family. e. g., to pay debts or liquidate demands of legal necessity.—*Jugur-nauth Khootiah v. Doobo Misser.*—S. W. Rep. Vol. XIV, c. r. p. 80.

An undivided member of a Hindú family cannot sell a portion of the ancestral estate unless driven thereto by pressing necessity. *Rama Kuttu Aiyan, v. Kulatturaiyan.*—11th December 1859.

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* See the fourth edition of Strange's Hindú law, by J. D. Mayne Esq., p. 362.

Mad. S. A. 1859, p. 270. See also *Rama Pillai* and others v. *Sreerungum Pillai* and others.* 25th April 1860.—*Ibid.* p. 49.

Sale of property by an undivided member is not valid, even if falling within the limits of his individual share, unless made under emergent circumstances and with reservation of the shares of his sons and a sufficiency for the maintenance of his wife and daughters. *Kanakas-bhaiya Pillai* v. *Sesha-chalu Sastri.**—8th February 1860. Mad. S. A. R. p. 17.

MADRAS, H. C.†—*The 2nd and 15th of December*, 1863.

VIRA-SVÁMI GRÁMINI *versus* AYYA-SVÁMI GRÁMINI.

According to the Hindoo law current in Madras the member of an undivided family may alien the share of the family-property to which, if a partition took place, he would be individually entitled.

There may be a valid sale of such a share upon an execution in an action of damages for a tort.

Such damages and the costs recovered constitute a judgment debt in respect of which the execution-creditor's rights are the same as those upon any other judgment for the payment of money.

Scotland, C. J.—This was a suit for the recovery of two houses and premises numbered respectively 82 and 83, in the Chúlé Bazaar road, which the plaintiff had purchased at a sale by Sheriff of Madras under a writ of *fieri facias* issued to recover the amount of damages and costs in an action of trespass against the defendant Ayya-svámi Grámini and others. Three issues were settled. The first was whether at the time of the sale the houses and premises were the sole and exclusive property of the defendant Ayya-svámi Grámini, and the third, whether at the time of the sale there was any valid and subsisting mortgage of the house No. 82. The Court disposed of these issues at the close of the case, finding the first in the negative and the third in the affirmative, and both against the

* See the fourth edition of Strange's Hindú Law, by J. D. Mayne, p. 362.

† Present: Scotland, C. J. and Bittleston, J.

plaintiff. But the second issue raised a further question whether, assuming the houses and premises to be the property of the undivided family of which Ayya-svámi and the defendants Ayya-svámi Grámini and Devanè Ammal are members, the plaintiff by virtue of such sale acquired any and what title and interest in the same; and upon this question we have now to give judgment.

For the defendants it was contended as a matter of law that the sale by Sheriff passed no interest whatever in the family property, for that even if it had been an alienation by Ayya-svámi himself without the consent of his co-parceners, such alienation would have been void and inoperative even to the extent of his own share; and this being a sale upon an execution in an action of damages for a tort was put as an *a fortiori* case. But we are of opinion that Ayya-svami might have made a valid alienation of his share and interest in the property, and that it passed under the sale in execution by Sheriff. As regards the supposed distinction where, as in the present case, the execution is for damages for a tort, we think that the damages and costs recovered constitute a judgment debt, and the right of the execution-creditor thereunder, is the same as upon any other judgment for the payment of money. To hold differently in this case would be in effect to declare the pecuniary immunity of all members of undivided Hindú families not possessing self-acquired property for any wrong, however great, which they may commit.

Mr. Mayne, however, mainly relied upon the general ground that no alienation by a member of an undivided Hindú family without the consent of his co-parceners can bind even his own share; and he asked our consideration of several decisions of the late Sudder Court upon this subject. It was not disputed that the course of decision in the late Supreme Court since at least the case of *Rama-swamy* v. *Sasha-chella*, and the opinion expressed by Mr. Colebrooke in his observations upon that case supported the validity of such an alienation to the extent of the alienor's own share: nor that the same rule of law prevails in Bengal. But it was said that there is a foundation for the rule in Bengal which does not exist according to the Hindú law applicable to Madras, for that in Bengal the share of each parcener is treated as separate even before partition, though unascertained.

In support of this the 31st section of the second chapter of the *Daya-bhaga* was referred to. But that section appears to be a quotation from *Narada*, and according to Mr. Colebrooke's note to the passage it is otherwise interpreted by different compilers, and is generally understood as declaring the separate and independent right of co-heirs who have made a partition; and certainly the language of the passage itself refers to a condition of separation to some extent. But we do find in Chap. XI, Sect. i, § 26, on the widow's right of succession, that the author, in the course of a discussion upon the contradictory statements of text-writers and commentators, makes the observation that "it is not true that, in the instance of re-union [and of a subsisting co-parcenery] what belongs to one appertains also to the other parcener. But the property is referred severally to unascertained portions of the aggregate. Both parceners have not a proprietary right to the whole." This observation, however, is used only in reply to the argument, that the preferable right of surviving parceners may be deduced by inference from the fact that "the same goods, which appertain to one brother, belong to another likewise," and that "when the right of one ceases by his demise, those goods belong exclusively to the survivor, since his ownership is not divested." But according to both schools of Hindú law the right of survivorship is not absolute, and the undivided share, according to both, descends to his sons; and it seems to us that the real ground upon which the widow's right of succession is placed in the *Daya-bhaga* is the authority of Vrihaspati, who says that "a wife is declared by the wise to be half the body of her husband, equally sharing the fruit of pure and impure acts. Of him whose wife is not deceased half the body survives." Adding by way of question "How then should another take his property while half his person is alive?" So that the right in truth rests upon the oneness of husband and wife, not upon the existence of a separate estate and interest of the husband in the property during his life. Such a separate estate as a matter of inference might be deduced as well from the descent of the father's undivided share to sons, which is common to both schools of law, as from its descent to his widow, which is peculiar to the Bengal school. It is further to be observed that whatever distinction there exists in this respect was

certainly present to the minds of Mr. Colebrooke and of the Judges who decided the cases above referred to.

It only remains for us to notice the Sudder Court decisions to which our attention was called. We have looked at these cases, seven in number, and we find that three of them expressly decide that one of several co-parceners may bind his own share by alienation and that it is liable for his individual debt. These are the decisions to be found at p. 222 of the Reports for 1853, at p. 235 of the Reports of 1855, and at p. 247 of the Reports for 1860, which is the latest case. There are, however, in the volume for 1860, two decisions in which the contrary is held. One of these, at page 67, is rested upon the authority of the other at p. 17, and that again is rested upon the authority of the decision at p. 270 of the Reports of 1859. Looking at that case it does not seem to go the length supposed in two last mentioned cases: for the judgment in terms recognizes the power of the co-parcener to confer upon the purchaser a right to what might eventually fall to his share at division, and the suit being for the recovery of a specific portion of property upon an alleged division, which was disbelieved, appears to have been properly dismissed. As to the decision at p. 215 of the Reports for 1854, we need only say that the Court appears to have proceeded upon the ground that the managing member having the control of the family property in his own hands could not proceed by suit and process to enforce his individual claim against the property.

We see nothing in those decisions that materially conflicts with (and some of them supports) the opinion we have above expressed, and Sir Thos. Strange in the first volume of his work of authority, at page 202 expressly says "that in favor of a *bonâ fide* alienee of undivided property, where the sale or mortgage could not be sustained as against the family, such amends as it could afford would be due out of the share of him with whom he had dealt, and for this purpose a court would be warranted in enforcing a partition."* What the purchaser or execution-creditor of the co-parcener is entitled to is the share to which if a partition took place the co-parcener himself would be individually entitled, the amount of such share of course depending upon the state of the

* See Bhunder Bhat v. Venkatesh Sanbhag — Bom. H. C. R. Vol. X. p. 139. post.

family. In this case there appear to be two brothers and a step-mother, and the share of each brother is a moiety. There is no evidence of Ayya-svámi's having sons. If he had, they would no doubt be entitled to shares in their father's moiety, and so the property available for the plaintiff would to the extent of their shares be reduced; and except in this way the existence of sons would not, we think, affect the plaintiff's right. Having then established his right to an undivided moiety subject to a charge for maintenance, we might, as in an action of ejectment in the late Supreme Court, have decreed to the plaintiff possession of the undivided moiety in both the houses, but for the mortgage that has been proved under the third issue; although further proceedings should be necessary in order to realize to the plaintiff the actual enjoyment of the moiety. In suits under the Civil Procedure Code, the Court is certainly bound to take into consideration all the rights of the parties to the suit, whether legal or equitable, and by its decree to give effect to those rights as far as possible; but we think that the court should confine itself to granting such relief as is prayed by the plaint. In the present case, therefore, as the suit is simply for the recovery of possession, and as there was at the time of the sale by the Sheriff and at the institution of the suit a valid subsisting mortgage of the house No. 82, entitling the mortgagee to possession, the Court can only decree to the plaintiff the right to possession of Ayya-svámi's share in the house No. 83.

The plaintiff is to have the costs of the second issue, to be paid him by the first, third and fourth defendants. The Plaintiff will pay all the defendants their general costs of suit.—Mad. H. C. Dec. Vol. I, p. 471.

MADRAS H. C. A.*—*The 22nd of June*, 1865.

Special Appeal No. 188 of 1865.

PALANIVELAPPA KAUNDAN, Appellant,

versus

MANNÁRU NÁIKAN and another, Respondents.

A sale by a father is valid by Hindú law to the extent of his own share of the undivided estate. There is no distinction according to the Madras school between a father and other co-parceners.

This was a special appeal against the decree of the Additional Principal Sudder Amin's Court of Coimbatore in Regular Appeal No. 244 of 1863, reversing the decree of the District Munsif's Court of Bhavani in Original Suit No. 57 of 1863.

The Court delivered the following:—

Judgment.—In this case the plaintiff has most improperly been allowed by the Munsif, whose irregularity has not been noticed by the Principal Sadr Amin, to sue for what he calls the cancellation of an agreement made by his father. The real truth of the matter is that the 2nd defendant, the father of plaintiff, has sold land alleged to be family property to 1st defendant, and that, as is now admitted, the land has actually been delivered in pursuance of the sale. It is manifest that the cancellation of the *rází-námah* would be of no use whatever to the plaintiff, and that he ought to have been compelled to sue for what he really wanted.

In argument, treating this case as an action for the recovery of the land, it has been contended that a sale by the father is altogether void, that partition for the purpose of satisfying his contracts cannot as in other cases be directed. The principle upon which, following the suggestion of Sir T. Strange and Mr. Colebrooke, the Courts have of late years satisfied the contract of one individual member out of the share which would come to him on partition, is that as the co-parcener has contracted he ought to fulfil his contract, that he could, if disposed, at any time, according to the doctrine of the Madras School, enforce a partition, and that it is only just that, where he has incurred an obligation, he shall not be allowed to

* Present: Frere and Holway, *Judges.*

escape its effects by the allegation that his own deed was *ultra vires*, but compelled to give to his creditor all the remedies to which he would himself be entitled as against the object matter of his agreement. It is quite clear that on the theory of the Madras School there is no distinction between a father and other co-parceners.

We, therefore, refer to the Lower Court the issue:—To what portion of the land sued for would the 2nd defendant be entitled on a partition enforced by suit?

It is accordingly hereby ordered that the Principal Sudder Ameen do return his finding on the foregoing issue within six weeks from this date.—Stokes' Mad. H. C. Rep. Vol. II, p. 416.

BOMBAY H. C.—*The* 18*th of August*, 1863.

GUNDO MAHÁDEV, *Appellant*,
RÁM BHAT BIN BHÁÚ BHAT, *Respondent*.

A member of an undivided Hindú family has power to mortgage his *own* share of the family estate, and, if he be acting as representative and manager of the undivided family, to mortgage the interests of the other members of the family therein on any common family necessity, or for the common benefit and use of the undivided family.

This was an action by Gundo Mahádev to recover the sum of Rs. 267-7-6, alleged to be due on a mortgage bond executed by Narsi Bhat, a member of an undivided Hindú family. The property mortgaged consisted of a house.

The Court delivered the following judgment:—We hold that Narsi Bhat had power to mortgage his own interest in the house, although the family was undivided, and that, if he were acting as representative and manager of the undivided family, he had power to mortgage the whole of the house upon any common family necessity, or for the common benefit and use of the undivided family. We, therefore, reverse the decree of the Court below and remand the case, in order that the judge may determine whether the plaintiff can show that Narsi acted as representative of the family, and executed the mortgage under any common family necessity, or for their common benefit, and may pass a new decision in conformity with our view of the law.

The second defendant, Rám Bhat, to be at liberty to prove that Narsi Bhat was not acting as manager, or that there was collusion between Gundo Bhat and Narsi.—Bom. H. C. Rep. Vol. I, p. 39.

The manager of an undivided Hindú family, if acting in his individual capacity, can sell his own share of the family property only.—*Dámodhar Vithal Hari*, Appellant, *Dámodhar Hari Soman*, Respondent.—Bom. H. C. Rep. Vol. I, p. 182.

Held that on this side of India, a member of an undivided Hindú family cannot, without the consent of his co-parceners, make a *gift* of his share of undivided property or dispose of it by will.—*Gangu-bái Kom Sidhápá* and another v. *Rámanná Bin Bhimanná.**—Bom. H. C. Rep. Vol. III, p. 66.

Bombay H. C.—*The 17th December*, 1869.

Tuká-rám Ambái-dás, *Appellant*,
Rám-chandra valad Bhimanná Dhugi, *Respondent*.

On this side of India a member of an undivided Hindú family can, without the consent of his co-parceners, sell his share in the undivided property.

Per curiam:—The facts found by the District Judge are—that Bhimanná and his sons Vithobá and Ram-chandra were an undivided family, and that Bhimanná with the consent or acquiescence of Vithobá, but without Rám-chandra's consent, sold the family house to the plaintiff. Under these circumstances the Judge has awarded a half-share of the house to the plaintiff, who appeals, on the ground that he is entitled to the whole house. On the other hand it is contended for the respondent that the sale was invalid, since a member of an undivided family cannot, without the consent of his co-sharers, alienate even his own share of the family property. The authority relied upon in support of this proposition is the case of *Gangu-bái* v. *Rámanná (supra.)* We think that the decision in that case went no further than to declare that a member of an undivided family cannot, without consent of co-parceners, make a *gift* of his share, and that it in no way affected the previous decision

* See Basudev Bhat v. Venkatesh Sanbhao. Bom. H. C. R. Vol. X, p. 139. Post 161.

of this Court that a member of an undivided Hindú family can sell his own share of the family property. *Dámodhar Vithal* v. *Dámodhar Hari (supra.)* We hold, therefore, that the sale to the plaintiff is valid as regards the share of Bhimanná, and invalid as regards the share of Rám-chandra. We accordingly amend the decree, by decreeing two-thirds of the house to the appellant.—Decree amended.—Bom. H. C. Rep. Vol. VI, p. 247.

AGRA, S. D. A.—*The 28th of March,* 1864.

Present:

W. Roberts, Esq. *Offg. Judge,* and F. B. Pearson, Esq. *Offg. Extra Judge.*

BYJ-NATH SINGH and others, (Plaintiffs,) Appellants,

versus

RAMESHUR DYAL and others, (Defendants,) Respondents.

In provinces where succession among Hindús is governed by the Benares Shásturs, alienation of joint property, even to the extent of the alienor's own share, invalid, but if the property be partitioned, the transfer is legal.

The plaintiffs, who are co-heirs in mouzah Bhoj-pore and other mouzahs of Kureeat Mithoo, in zillah Azimgurh, sue to avoid a deed of sale made in favor of the defendant, Sheo Gholam Singh, by one Rameshur Dyal also a co-partner. They allege that as the seller is childless, the sale by him is invalid.

The Moonsiff, finding the plaintiffs and the defendant Rameshur to be of one family, and the defendant to be without issue, ruled that the sale was invalid, and decreed the claim in favor of the plaintiffs, the co-partners.

The Judge has reversed the decision on the ground that the seller who is of an age to have issue, is not controllable in respect of the alienation of the property by the co-parceners. He finds by some precedents, (of which one* only need be cited here as appli-

* No. 24 of 1859, dated 19th of July 1860. Muhesh Pandey and others, *versus* Bhugwunt and others, North Western Provinces Vol. XIV, page 463.

cable to the case), "that the seller has the undoubted right to transfer his property in any way he pleases."

In appeal it is contended that the sale, being an alienation of joint family-property by a childless co-partner, is invalid under the Hindû Law.

Judgment—

We find ourselves compelled to remand the case for a distinct finding as to whether the property in suit is joint or divided, as the validity of the transfer depends upon the determination of this point.

It is observed in that decision that the consent of the nephews is not requisite under either the *Mithilá* or *Mitákshará* Law to render the alienation of ancestral property valid. The principle of the distinction is explained in the Mitákshará cited (V., page 210, paragraph 3,) and from Macnaghten's Hindu law, Vol. 1, page 46, *viz.*, "that a son has a right in his father's property from the time of his birth, whereas a nephew can have no right until after the death of the party from whom he inherits."

We observe, however, that it is not stated whether the property was undivided or partitioned, though it is inferrible from the report at page 934 of the 30th May 1857, of this case which was remanded on the date, that it was divided property. It has, we remark, been long ruled by the precedents cited, that the alienation of joint property is invalid, even to the extent of the alienor's share, except when made with the assent of the rest of the co-partners. The first of these cases is governed by *Mithilá law*; the second a Mirzapore case by Benares Law.* In both, the Mitákshará is quoted as the authority, the principle being that partition is necessary for the ascertainment of individual rights, ("is the act of ascertaining"), and that until division has taken place, transfer is invalid. Although, therefore, "Hindoo Law does not permit alienation of land held jointly by several puttee-dars or owners to be made by one, without the assent of others, nor indeed does such alienation hold good for the aliening partner's individual share, even without the assent of

* Nundram and others, *versus* Kashee Pandey, Select Reports, Vol. III, page 232, affirmed on Reviews, Vol. IV, page 71. Sheo-surun Misser, *versus* Sheo-suhai, Reports, Vol. IV, page 160. *Ante* p. 133.

the rest," yet such alienation does hold good if the property is divided, as is evident from the ruling of the Calcutta Sudder Court in the case of *Gopaul Pandey*, and the doctrine laid down in the decision of this Court in the case quoted by the Judge.

But in the absence of a distinct finding that the property here in suit is partitioned, (although it would seem from an expression at the commencement of the Judge's decision that it is so), we feel ourselves precluded from pronouncing upon the validity of the sale.*

We annul the decision of the Judge who will proceed to find, according to the rule above laid down, whether the property here in suit is divided, and decree the validity or invalidity of the sale according to the status of the property; providing at the same time for the costs of this appeal.—Agra, S. D. A. Dec. for 1864, p. 299.

CALCUTTA, H. C. A.—*The 30th of July,* 1869.

Before

Sir Barnes Peacock, *Kt., Chief Justice.*

Mr. Justice Kemp, Mr. Justice L. S. Jackson, Mr. Justice Macpherson, and Mr. Justice Glover, *Judges.*

SADÁBART PRASÁD SÁHU, (one of the Defendants,)

versus

FOOL BÁSH KOER, Mother and Guardain of HARI-NÁTH PRASÁD, Minor (Plaintiff,) and others (Defendants).†

A member of a Hindú family, living under the *Mitákshará* law, and having joint family property, died entitled to an undivided share in such property, leaving two widows, him surviving. The widows were sued in their representative capacity in respect of debts incurred by him during his life-time, on his own account, and decrees were obtained against them. In execution, an interest in certain portions of the joint family property, to the extent of the share to which the deceased was entitled in his life-time, was sold, and the auction-purchasers obtained possession of it.

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* The Hindoo Law Officer's ruling is to the effect "that if the vendor had lived separately, and provided his food and clothing separately, and been personally in possession of the property in suit, he was at liberty to alienate it."

The land in suit is ruled to be altogether and solely in possession of the vendor.—Decision of the Sudder Dewanny Adawlut, N. W. Provinces, 1860, page 464.

† Regular Appeal, No. 165 of 1865 (and analogous cases), from a decree of the Subordinate Judge of Sarun, dated the 9th April 1866.

Held, that the share of the deceased did not at his death pass to his widows, but that (there being no male issue) it passed to the remaining members of the family by survivorship, and could not be rendered liable to the debts of the deceased in a suit against his widows.

***Quære*, whether those who take the share by survivorship, are liable for the debts of the deceased to the extent of his share.**

A member of a joint Hindú family has no authority, without the consent of his co-sharers, to mortgage his undivided share in a portion of the joint family property, in order to raise money on his own account, and not for the benefit of the family.

The following questions were referred to the Full Bench by Mr. Justice Kemp and Mr. Justice Markby :—

Markby, J.—In this case, having regard to the difference of opinion expressed in the cases of *Damodhur Vithul Hari* v. *Damodhur Hari Somana*(1), *Gondoo Mohadev* v. *Ram-bhat Bin Baboo-bhat*(2), and *Palani-velappa Kaundan* v. *Mannaru Naikan*(3), on the one hand, and that of Cosserat v. Sudaburt Pershad Sahoo(4), on the other,—we refer the following questions to the consideration of the Full Bench :—

Bhagwan Lal, a member of a Hindú family, living under the Mitákshará law, and having joint family property, died entitled to an undivided share in such property, and leaving two widows, Mahesi Koer and Mussummat Parbati Koer, him surviving. After the death of Bhagwan Lal, his widows were sued in their representative capacity in respect of debts incurred by him in his life-time on his own account, and not for the benefit of the joint family, and decrees were obtained against the widows in that capacity. In execution of one or more of these decrees, an interest in certain portions of the joint family property, to the extent of the share to which Bhagwan Lal was entitled in his life-time, has been sold by auction, and the purchasers have taken possession. Can the nephew of Bhagwan Lal, who is one of the surviving members of the joint family, recover from the purchasers possession of the interests which they have purchased, or any part of them ?

Bhagwan Lal, in his life-time, executed an ordinary *zuri-peshgi* mortgage in respect of his undivided share in a portion of the joint family property, in order to raise money on his own account, and not

(1) 1 Bom. H. C. Rep., 182. *Ante* p. 146.
(2) 1 Bom. H. C. Rep., 39. *Ante* p. 145.
(3) 2 Mad. H. C. Rep., 416. *Ante* p. 144.
(4) 3 S. W. R., 210. *Ante* p. 36.

for the benefit of the family. Can the nephew of Bhagwan Lal recover from the mortgagee, without redeeming the same, possession of the mortgaged share, or any portion of it?

The following is the judgment of the Full Bench, on the first question, delivered by

Peocock, C. J.—The parties to this suit not having consented that this Bench should decide the whole of the case upon regular appeal, it is necessary for us to decide the question which has been referred to us by the Division Bench.

The question is: "A member of a Hindu family living under the Mitáksharâ law, and having joint family property, died entitled to an undivided share in such property, leaving two widows him surviving. After his death, his widows were sued in their representative capacity in respect of debts incurred by him during his life-time on his own account, and decrees were obtained against the widows. In execution, an interest in certain portions of the joint family property, to the extent of the share to which the deceased was entitled in his life-time, was sold, and the auction purchasers obtained possession of it. Can the nephew of the deceased, who is one of the surviving members of the joint family, recover possession of such interests, or any portion thereof, from the auction purchasers?"

It is stated that the widows were sued in their representative capacity, and that the sale took place under a decree against them in their representative capacity. We must assume that the sale took place under decree in that suit. The certificate of sale simply says that the rights and interests of the widows were sold; but assuming that the widows were sued in their representative capacity, the certificate must be considered to apply to such property of the deceased as they took in their representative character. It is contended that, under section 203 of the code of Civil Procedure, the execution-creditor was entitled to seize Bhagwan's share of the undivided joint estate and to sell it. The Section is as follows:—"If the decree be against a party as the representative of the deceased person, and such decree be for money to be paid out of the property of the deceased person, it may be executed by the attachment and sale of any such property." But I apprehend that the meaning of this is, that where the decree is against a representative of a deceased person,

and the decree is for money to be paid out of the property of the deceased, it must be paid out of such of the property of the deceased person as passed to the representative. If, for instance, under the English law, an executor should be sued for a debt, and a decree obtained against him, I apprehend that, as a general rule, you could not, under that decree, seize property which passed to the heir, and not to the executor.

Whatever may be the construction of section 203, the property which was seized in execution and sold was not the property of the deceased person at the time it was seized. It was his neither legally, nor equitably, nor had his heirs any legal or equitable interest whatever in it.

According to the Mitákshará law, if a member of a joint undivided family dies without a son, and leaving a brother, his widow does not take his share by descent. If he leaves a son, the son takes by descent; but if he leaves only a widow, the survivors take by survivorship, and they hold the property which they take by survivorship, legally and equitably for themselves, and not in trust for the heirs of the deceased. The deceased's heirs have no interest either legally or equitably in the share which passes by survivorship to the surviving cosharers.

That the estate survives, and does not pass to the widow by inheritance, has been held by the Privy Council to be the law. They held that, in the absence of a son, the share of a deceased member of a joint family, under the Mitákshará law, does not go to the widow or to the person who would be next heir of the deceased if the widow were not in existence. It appears to me to be clear that the property seized was not the property of the deceased in the hands of his widows as his representatives, nor was it property over which the widows had any power whatever, or with regard to which they had any legal or equitable right; it was property which belonged wholly, both legally and equitably, to the survivors. If the deceased had left a son, his interest would have gone to the son as his heir, and then his interest, no doubt, would have been assets in the hands of the son for the purpose of paying the father's debt.

If the survivors who take the property by survivorship are liable to pay the debts, they can only be made liable by a suit against them, and not in a suit against the widows. If survivors

are liable to payment of debts out of the property taken by survivorship, it is only just and reasonable that they should have an opportunity of showing that no debts were due. If they were sued for the debts in consequence of their taking the interest of the deceased by survivorship, they might show that the deceased left no debts.

It is unnecessary for us to decide whether, under a decree against Bhagwan in his life-time, his share of the property might have been seized, for that case has not arisen. According to a decision in Stokes' Reports, it might have been seized, but the case as against Bhagwan and that against the survivors is very different. So long as Bhagwan lived, he had an interest in this property which entitled him, if he had been pleased to have demanded a partition, and to have had his share of the joint estate converted into a separate estate.

The case of *Ishan Chandra Mitter* v. *Buksh Ali Sowdagur*,* was quoted as an authority, but that appears to me to be a very different case. There the widow was sued. The plaintiff alleged that the husband had died, and that he had left a widow and a minor son. In that suit the son being a minor, the question was whether the decree was not in substance a decree against him represented by his mother as his guardian.

I think, therefore, that this property not being the property of the widows, and not being the property of the heirs of the deceased, could not be made available under the decree against the widows; that if it could be made available at all for payment of the debts of the deceased, it must be in a suit against the survivors to charge the share of the deceased in the joint estate with the payment of the decree, or by suing the survivors for the debt, and asking to have the deceased's share of the estate made available in the hands of the survivors to the same extent as that to which it would have been made available if the deceased had left a son, and the estate had gone to him by inheritance.

I think, then, that the question must be answered in the affirmative, that the plaintiff has a right to sue the purchaser under that decree, to recover back the estate, inasmuch as the property belongs

* 1 Mar. Rep. 614.

to him, and the title of the defendant, as a purchaser under the decree against the widows, is an invalid title.

Kemp, J.—I never entertained any doubt that the plaintiff took the estate of Bhagwan Lal in right of survivorship. My doubt was whether he took the estate of Bhagwan *cum onere*, that is to say, burdened with the payment of Bhagwan's debt or not? Unfortunately our reference has been so worded that this point, which is of the utmost importance, has not been decided. The judgment of His Lordship the Chief Justice, though it approaches the question very closely, does not solve it. For the rest, I concur in the judgment which has been delivered by the learned Chief Justice.

Jackson, J.—I also concur in the answer which it is proposed to give to the first of the two questions referred to the Full Bench.

Mackpherson, J.—I concur.

Glover, J.—I am of the same opinion.

The following is the judgment of the Full Bench, on the second question, delivered by

Peacock, C. J.—(The other Judges concurring). The first question has already been answered. The second question raises the point whether a member of a joint Hindu family, governed by the Mitákshará law, can mortgage his undivided share in a portion of the joint family property, in order to raise money on his own account, and not for the benefit of the family. There are conflicting decisions upon the subject, as pointed out by the Division Bench, by which the question was referred. The cases referred to from Dunbar's Bombay Reports, and that from the reports of the High Court at Madras, are in support of the affirmative. The case of *Cosserat* v. *Sudaburt Pershad Sahoo** is an authority in support of the negative. This case has been very ably argued by the pleaders on both sides; and in addition to the Mitákshará on Inheritance, translated by Mr. Colebrooke, numerous passages have been cited from the Sanskrit of other parts of the *Dharma Sástra* of Yájnyavalkya, together with several cases in addition to those referred to by the Division Bench. Amongst others, the pleaders, in support of the affirmative, have referred to the case of *Virasvámí Gramini* v. *Ayyasvámí Gramini*.† In that case it was held that, according to

* 3 W. R. 210. *Ante*, p. 36. † 1 Mad. H. C. R. 471. *Ante*, 139.

the Hindú law, as it prevails in Southern India, one member of a joint Hindú family may sell his undivided share of joint property, and that such share is liable to be seized and sold in execution for the separate debts of the sharer.

The decisions founded on the doctrine of the Schools of Southern India and of Bombay, though entitled to great weight, are not sufficient to justify this Court, in a case governed by the Mitákshará law, in overruling a long series of decisions expressly founded upon that law.

In *Appoovier* v. *Rama Súbha Aiyan* and others,* it was held that an actual partition by metes and bounds was not necessary to render a division of undivided property complete; but that when the members of an undivided family agree among themselves with regard to a particular property, that it shall henceforth be the subject of ownership in certain defined shares, then the character of undivided property is taken away from the subject-matter so agreed to be dealt with; and each member thenceforth has in the estate a definite and certain share which he may claim the right to receive and enjoy in severalty, although the property itself has not been actually severed and divided.

In that case, however, their Lordships stated that they would be unwilling to reverse any rule of property which had been long and consistently acted upon in the Courts of the Presidency; and we must, I think, be guided by the same principle.

Now the case referred to in support of the negative of the question, namely, *Cosserat* v. *Sudaburt Pershad Sahoo*,† was not the first case in which it was held that, according to the Mitákshará law, one member of a joint family cannot alienate his own share of joint family property, without the consent of all the other members. That decision was founded upon a current of authorities supported by the *Vyavasthás* of Pandits, which it is too late now for the courts to overrule, even if it were disinclined to agree in the principle established by them.

In *Nundram* v. *Kashee Pundey*,‡ the question was put to the Hindu Law Officers of the Court whether it was lawful, according to

* 11 Moore's I. A., 75. † 3 W. R., p. 210. *Ante*, p. 36.
‡ 3 Sel. Rep., (1822), 232. See post.

the law current in Tirhoot, for any one of several co-parceners, to transfer his share either by sale or gift; to which the *Pandits* replied that a gift of joint undivided property, whether real or personal, was not valid even to the extent of the donor's share, and that the property could not be sold or given away, until it was defined and ascertained, which cannot be done without a division; and they referred to the Mitákshará, by which it was said that "partition is the act of ascertaining several individual rights." The Court, acting upon that opinion, affirmed the decision of the lower court.

Afterwards a review having been applied for upon suspicion that the Pandit who had delivered the *Vyavasthá* had been bribed, a fresh *Vyavasthá* was called for from other Pandits of the Court, who answered that property being held in joint tenancy by several sharers, whether it be real or personal, no one of the said sharers has authority, without the permission of the co-sharers, to call any part of the said property his share and to give it away, and they cited as authorities, first *Vyása* in the Mitákshará:—"In immovable property, whether divided or undivided, all the sharers share alike: among them one person cannot sell, mortgage, or give it away; secondly, *Nareda* in the Dattaka Mimánsá:—"Property held in common among many sons cannot, under any circumstances, be alienated." Upon considering the above *Vyavasthá*, the Court ultimately upheld, upon review, the former decision.

The *Vyavasthá* given in the original case is quoted as an authority in Macnaghten's Hindú law, page 224, case XVII, (Post).

The principle of the above case was adopted in the case of Sheo Surn Misser v. Sheo Sahai* decided in 1826, upwards of 40 years ago. In that case the Judges of the Sudder Dewanny recorded their opinion as follows:—

"The Hindú law, as laid down in *Vyavasthás* delivered in "former cases" (referring to the cases above cited), "does not permit alienation of lands held jointly by several *pattidars* or owners to be made by one, without the assent of the others; nor indeed does such alienation hold good even for the aliening partner's individual share, without the assent of the rest."

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* 4 Sel. Rep. (1826), 158. *Ante*, p. 133.

In a note to the last case, it is said:—"The same doctrine was also maintained in a Tirhoot case, wherein Rajah Bedyanund was appellant, against Jay Dutt Jhá and others, respondents. The Pandits there also held the sale of joint undivided property to be invalid, without the consent of all the sharers, and not valid even for the seller's own share while undivided."

A *Vyavasthá* similar in effect, and a decision founded upon a similar principle, were given in 1832 in the case of *Jivan Lall Sing* v. *Ram Gobind Sing.**

The above principle was again acted upon in *Sheo Shurn Lall* v. *Jumun Lall*† and in *Mussamut Roopa* v. *Roy Reotee Rumun*‡.

A similar rule was followed and acted upon in the late Sudder Court of the North-Western Provinces, in the case of *Joynarain Sing* and others v. *Roshun Sing* and others§; and in the case of *Byj-nath Sing* v. *Ramessur Dyal* and others, decided in 1864, the same Court held that, in Provinces where the succession among Hindús is governed by the Benares *Shástras*, alienation of joint property, even to the extent of the alienor's own share, is invalid; but that if the property be partitioned, the transfer is legal. (See *Ante*, p. 147.)

In the *Vivâda Chintâmani*, by Prasanna Kumar Tagore, page 77, it is laid down that "what belongs to many may be given with their assent." "Joint ancestral immovable property may be given with the assent of all the heirs." "The assent of all the heirs is required for a gift of joint ancestral property, whether movable or immovable."—Page 78. "When the whole property is actually divided, the individual action of the share-holders is valid."—Page 79.

In the Mitâksharâ on Inheritance, it is said, Chapter I, Section 1, Verse 30:—"Among unseparated kinsmen, the consent of all is indispensably requisite, because no one is fully empowered to make an alienation, since the estate is in common.

I was at one time disposed to think that as one of several members of a joint family can compel partition of ancestral property

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* 5 Sel. Rep. 163.
† 6 Sel. Rep. (1837), 176.
‡ S. D. (1853), 344.
§ 2 S. D. A. N. W. (1860), 162.

against the will of others (see Mitákshará, Chap. I, Section 5, Verse 8), so he might, without the will of the others, alienate that share to which he would be entitled upon partition; but upon reflection I feel that that opinion cannot be maintained according to the true principle of the Mitákshará law. In the case of *Appoovier* v. *Rama-subha Aiyan*,* to which I have already referred, and which was a case governed by the Mitákshará, the Lords of the Judicial Committee say:—"According to the true notion of an undivided family in Hindú Law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property that he, that particular member, has a certain definite share. "No individual of an undivided family could go to the place of receipt of rent, and claim to take from the Collector or Bailiff of the rents a certain definite share. The proceeds of undivided property must be brought, according to the theory of an undivided family, to the common chest or purse, and then dealt with according to the modes of employment of the members of an undivided family. But when the members of an undivided family agree among themselves with regard to particular property that it shall thenceforth be the subject of ownership in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject-matter so agreed to be dealt with, and in the estate each member has henceforth a definite and certain share which he may claim a right to receive and to enjoy in severalty, although the property itself has not been actually severed and divided."

According to the law of England, if there be two joint tenants, a severance is effected by one of them conveying his share to a stranger, as well as by partition, but joint tenants under the English law are in a very different position from members of a joint Hindú family under the Mitákshará law; for instance, if a Hindú family consist of a father and three sons, any one of the sons has a right to compel a partition of the joint ancestral property; but upon partition during the life of the father, his wives are entitled to shares; and if partition is made after the death of the father, his widows are entitled to shares, and daughters are entitled to participate; see Mitákshará, Chapter VII. If partition be made during the life of the father, and another brother is afterwards born, that

* 11 Moore's I. A. 57.

brother alone will be entitled to succeed to the share allotted to the father upon partition.—Mitákshará, Chapter I, Section 6; but so long as the family remains joint, and separation has not been effected, either by partition or by agreement, such as that recognised in the case above cited from the Privy Council, every son who is born becomes, upon his birth entitled to an interest in the undivided ancestral property. In such a case, neither the father, nor any of the sons, can at any particular moment, say what share he will be entitled to when partition takes place. The shares to which the members of a joint family would be entitled on partition are constantly varying by births, deaths, marriages, &c., and the principle of the Mitákshará law seems to be that no sharer, before partition, can, without the assent of all the co-sharers, determine the joint character of the property by conveying away his share. If he could do so, he would have the power by his own will, without resorting to partition, the only means known to the law for the purpose, to exclude from participation in the portion conveyed away those who, by subsequent birth, would become members of the joint family, and entitled to shares upon partition. "They who are born and they who are yet unbegotten, and they who are still in the womb, require the means of support, no gift or sale should therefore be made."—Mitákshará, Chap. I, Section 1, Verse 27.

The Court has very carefully referred to the passages quoted from the Sanskrit of the *Dharma Shástra* of Yajnyavalkya, and in addition to the translation which was handed in, they have had a translation made by Baboo Shámá Charan Sircar, the chief sworn interpreter of the Court, as suggested at the time of the argument. The Court sees nothing in those extracts at variance with the opinions above expressed.

We are called upon to decide this case according to the Mitákshará law as we find it, and not according to our own views of policy. Whatever our opinions might be, in the absence of the decided cases to which I have referred, I am of opinion that we should not be justified in unsettling the law by overruling that current of authorities by which, for nearly half a century, the law appears to have been settled, and in accordance with the principles of which it appears to have been generally understood and acted upon.

I am of opinion that upon the simple fact stated in the second question, Bhagwan Lal had no authority, without the consent of his co-sharers, to mortgage his undivided share in a portion of the joint family property, in order to raise money on his own account, and not for the benefit of the family.

The facts are not sufficiently stated to enable this Bench to say whether the nephew of Bhagwan Lal can recover from the mortgagee, without redeeming the same, possession of the mortgaged share, or any portion of it.—Bengal Law Reports, Vol. III, p. 31.

CALCUTTA H. C.—14*th December*, 1870.

Before

Mr. Justice Norman, *Officiating Chief Justice*, Mr. Justice Loch, Mr. Justice Bayley, Mr. Justice Kemp, Mr. Justice L. S. Jackson, and Mr. Justice Mitter.

HANUMAN DUTT ROY, and another,
versus
BABOO KISHEN KISHOR NARAYAN SING.

According to *Sadábart Persád Sáhu* v. *Foolbásh Kooer** a sale of undivided ancestral property by a father without any legal necessity and without the consent of all the co-sharers, is, under the Mitákshará law, invalid. It is not valid even as regards the father's share. A son, suing to set aside such an alienation, is, according to that case, entitled to a declaration that the alienation is void altogether. The son suing in the father's life-time, on behalf of the family, may be entitled to a decree for possession. Upon what terms that decree should be made will, according to the decision in *Modhoo Dyal Singh* v. *Golbar Singh*,† depend on the equity which the purchaser may have to a refund of the purchase-money, or to be placed in the position of an incumbrancer as against the joint family in the particular case.

The judgments of the Court were as follows :—

Norman, J., (Bayley, Kemp, Jackson and Mitter, J. J., concurring.)—In this case the question referred for the decision of the Full Bench was this :—*(reads.)*

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* Ben. Law Report, F. B., p. 31. *Ante*, pp. 149—160.
† 9 W. R. 511. *Ante*, p. 84.

It appears to us that this question has been decided in the Full Bench decision to which reference is made in the order of the referring Judges.

Sadabart Prasad Sahu v. *Foolbash Kooer** adopts the rule laid down in the Mitákshará that the sale or mortgage of joint undivided property is invalid if made without the consent of all the co-sharers, and not valid even for the seller's own share when undivided. The argument which has been addressed to us would tend to show that, if an alienation is made by a father of joint ancestral property in a case in which no legal necessity exists, it might be treated as an alienation of the father's separate share. But the case of *Sadabart Prasad Sahu* v. *Foolbash Kooer* shows that, even if so construed, that alienation is invalid as against the joint family. A son, therefore, suing to set aside such alienation, is entitled not only to a declaration that the alienation is void as an alienation of the entire estate, but void altogether even to the extent of the share as to which the alienation is considered to be established. As a consequence of that declaration the son suing on behalf of the family may be entitled to a decree for possession. Upon what terms that decree shall be made, will, according to the decision in *Modhoo Dyal Singh* v. *Golbar Singh*,† depend on the equity which the purchaser may have to a refund of the purchase-money, or to be placed in the position of an incumbrancer as against the joint family in the particular case.

It appears to me that there is no question raised in this reference which has not substantially been disposed of in the two cases already decided.

Loch, J.—I accept the conclusion come to by the majority of the Judges who compose the Full Bench that the question asked in the reference has already been disposed of in the Full Bench judgments mentioned in the judgment now delivered by the Full Bench.—Bengal Law Reports, Vol. VIII, pp. 358—370.

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* 3 B. L. R., F. B. p. 31. *Ante*, p. 149.

† Case No. 1198 of 1867 ; 29th April 1868. *Ante*, p. 84.

Bombay H. C. A.—*20th & 31st March & 29th of April* 1873.

Vásu-dev Bhat, *Appellant*,
Venkatesh Sanbháv, *Respondent*.

It is settled law in the Presidency of Bombay, that one of several parceners in a Hindú undivided family may, without the assent of his co-parceners, sell, mortgage, or otherwise alienate, for valuable consideration, his share in the undivided family estate, movable or immovable.

It is also settled law in the same Presidency that a share in the undivided estate of a Hindú family may be taken in execution, under a judgment against the parcener to whom such share belongs, at the suit of his personal creditor.

Where a Hindú parcener voluntarily advanced money to his brother and co-parcener, for the purpose of his defence against a charge of forgery, without any previous request, and merely to save the reputation of the family, the obligation being no more than a moral obligation, was *held* not to be a sufficient consideration to support an assignment to the former by the latter of his share in the undivided family estate.

Westropp, C. J.—This suit was brought, in the Court of the Subordinate Judge at Coompta, by the respondent, Venkatesh Sanbháv, against the appellant, Vásu-dev Bhat, and his brother Munj-náth Bhat, to set aside an order made, we presume, under Section 246 of the Civil Procedure Code, raising an attachment obtained by the plaintiff (under a decree in a suit brought by him against the present second defendant, Munj-náth Bhat,) against three houses, to an undivided share in which Munj-náth Bhat was entitled, but which the plaintiff alleged to have been, by deed (exhibit 9,) executed shortly before the attachment, fraudulently and collusively assigned by that defendant, to his brother, the first defendant, Vásu-dev Bhat.

The Subordinate Judge, being of opinion that the deed of sale was insufficiently stamped, rejected it, and made a decree for the plaintiff.

The first defendant appealed to Mr. Spens, the District Judge of Canara, who held that the deed was sufficiently stamped, but was fraudulent; and he, accordingly, on that ground, affirmed the decree of the Subordinate Judge.

The first defendant has now made a special appeal to this Court, in disposing of which we must accept the following facts as found by the District Judge, *viz.*, that both of the defendants were, at the time of the execution of the deed of sale (Exhibit No. 9), members of an undivided family. Finally, the District Judge found that the

"second defendant in collusion with the first defendant" executed the deed of sale "in order to defraud creditors from whom he (the second defendant) had personally borrowed money."

It was argued before us that for two reasons the decree of the District Judge is erroneous : first,—that the family property, or any share in it, cannot, for the separate debt of one of several co-parceners in an undivided Hindú family, be lawfully taken in execution, and thus alienated previously to partition ; second,—that the sum of Rs. 3,500, having been actually paid by the first to the second defendant for his personal benefit only, was not properly chargable against the family at large.

With respect to the first point, as a preliminary remark, we should observe, that neither Bombay Regulation IV, of 1827, nor its substitute, the Civil Procedure Code, contains any exemption of a share in undivided property from liability to attachment and sale.

The objection, contained in the first point, has been rested upon the assumed inalienability of the share of a member of a Hindú family in the undivided estate belonging to the family without the assent of his co-parceners.

In Macnaghten's Hindú Law, Vol. I, p. 5, it is stated that "a co-parcener is prohibited from disposing of his own share of joint ancestral property; and such an act, where the doctrine of the Mitáksharâ prevails (which does not recognize any several right until after partition, or the principle of *factum valet,*) would undoubtedly be both illegal and invalid.

Macnaghten (Vol. I, H. L., pp. 5 and 6,) in illustration of the more strict doctrine against alienation, which some schools of Hindú Law hold the Mitáksharâ to justify, mentions the instance of a deed of *gift* in Behar (*Mithilá*), which was held invalid even to the extent of the donor's own share.* Other instances, to the same effect, of the Mithila doctrine are to be found in IV. S. D. A. Rep. pp. 158, 160, 330 ; V. Ibid. pp. 24, 163, 202 ; and VI. Ibid. pp. 176.

The passages in the Mitáksharâ on Inheritance, from which this doctrine has been drawn, are in Chap. I, Sec. I, placita 27 to 30 inclusive (Colebrooke's Translation, pp. 256, 257.) Of these, placitum 30 is that most relied upon. There the author, explaining the following passage from *Vrihaspati* as cited in the *Ratná-kara* :—

* 3 S. D. A. Rep. 232 and see pp. 144, 145.

"Separated kinsmen, as those who are unseparated, are equal in respect of immovables; for one has not power over the whole to make a gift, sale, or mortgage"—says it must be thus interpreted: "among unseparated kinsmen, the consent of all is indispensably requisite, because no one is fully empowered to make an alienation, since the estate is in common; but, among separated kindred the consent of all tends to the facility of the transaction, by obviating any future doubt, whether they be separate or united; it is not required, on account of any want of sufficient power, in the single owner; and the transaction is consequently valid even without the consent of separated kinsmen." The doctrine of the *Mayúkha*, as stated in Chap. IV, Sec. VII, pl. 36, 37, 38, does not seem materially to vary from that of the Mitákshará, but in the same chapter, Section I, pl. 6, it is admitted that ownership is acquired by co-parceners by birth, and their respective shares only ascertained by partition; so that a sale by a co-parcener of his share before partition could not, according to the *Mayúkha*, be regarded as a sale without ownership. See also *Smriti Chandriká* (Chap. VII, pl. 56, Chap. XV, pl. 1; Iyer's Translations, pp. 91 & 236,) which agrees with the Mitákshará.

Mr. Colebrooke, however, who stood first amongst the authorities on Hindú Law, writing, with a full knowledge of those passages, to Sir Thomas Strange upon a Madras case *Sashachella Pillay* v. *Rama-samy*,* said: "on the subject of the question, which you had lately before you, I entirely agree with you, that a mortgage, sale, or gift, by one of several joint-owners, without the consent of the rest, is invalid for *others'* shares. In Bengal law, it is clear, that it is good for his own share and for that only. In other provinces, it is as clear that the act is invalid, as it concerns others' shares; and the only doubt, which the subtlety of Hindú reasoning might raise, would be, whether it be maintainable even for his own share, of undivided property. On the two first points, then, as stated by you, the law is undoubtedly as you have viewed it. On the third point, I take the law to be that the consent of the sharers, express or implied, is indispensable to a valid alienation of joint property, beyond the share of the actual alienor; and that an un-

* 2 Madras Notes of Ca. 234 & 240.

authorized alienation by one of the sharers is invalid, beyond the alienor's share, as against the alienee" (Appendix to 2 Stra. H. L. p. 344). In the case, as to which Mr. Colebrooke thus wrote, Sir T. Strange held the alienation valid as regarded the alienor's own share, but invalid as regarded that of his co-parcener. As to another Madras case, Mr. Colebrooke said : "See Mitákshará on Inheritance, Chap. I, Sec. I, pl. 30, 32. None can dispose of joint property (especially immovables) without consent of the sharers." The alienor there had attempted to dispose not merely of his own share in a village, but of the whole village. Mr. Colebrooke continued: "But here the sale appears to have been without authority, general or special. In setting it aside on this ground, equity would require redress to be afforded to the purchaser, by enforcing a partition of the whole, or a sufficient portion of it so as to make amends to the purchaser out of the vendor's estate." Mr. Ellis, as to the same case, said : "The sale is valid only so far as the seller's share in the property extended" (Appendix to 2, Stra. H. L. 349, 350). Sir Thomas Strange (I. Stra. H. L. 200) said: "Accordingly it imports creditors to take notice whether the family, with which they are about to deal or contract, be divided or undivided; and, if the latter, at their peril, to see that the transaction be one, by which the rest of the co-heirs will be concluded; since otherwise, he only with whom it had been entered into, will be answerable for it, and not the common stock. Such seems to be the result of the decisions referred to below; of which those at Bengal rest upon the highest living authority in Hindú Law, that of Mr. Colebrooke, who upon this point, and with reference to a case at Madras, upon which he was consulted, held 'that the consent of the sharers, express or implied, is indispensable to a valid alienation of joint property, beyond the share of the actual alienor's, observing, in the course of his opinion, 'that the only doubt which the subtlety of Hindú reasoning might raise would be whether it be maintainable even for his own, the property being undivided." Such *may be* the construction of a passage in the Mitákshará on the ground of co-ordinate property (Mitákshará Chap. I, Sec. I, pl. 30). But where each parcener is considered to have vested in him during the co-partnership, a several, though unascertained, right, as is the case where the authority of *Jimúta Váhana* prevails, it is clear that there may be an assign-

ment before partition; the alienee becoming a sort of tenant in common with the other parceners, admissible, as such, to his distributive share upon a partition taking place; and even with respect to an alienation of the whole, it would be good for the alienor's share, though for his attempt to dispose of more, unwarranted, he would be liable to penal consequences." Subsequently, at page 202, Sir T. Strange says: "In favour of a *bonâ fide* alienee of undivided property, where the sale or mortgage could not be sustained as against the family, such amends as it could afford would be due out of the share of him with whom he had dealt; and for this purpose, a Court would be warranted in enforcing a partition."

The next observations of Mr. Colebrooke are of great importance, and, no doubt, have much influenced the Madras and Bombay Courts in taking the course which they have adopted. He continued thus: "It may be objected to *Vijnyáneshwara* and the *Smriti Chandriká*, that the texts, which prohibit gifts of any portion of joint property, or of the whole of a man's sole property, thereby distressing his family, equally forbid sale and mortgage of it; so that these also would be void, although a valuable consideration have been paid and received. Injury and injustice may, however, be prevented by holding him and his property answerable for the repayment of the money or valuable consideration received by him; and equity, perhaps, would award partition, for the purpose of enforcing payment from his share, thus rendered a separate one." (Here Sir T. Strange refers by a foot-note to the passage in his work already quoted from Vol. I, p. 202). Mr. Colebrooke continued: "But in the case of a gratuitous alienation, there are not the same difficulties; and I apprehend that under the Hindú law, as received among those with whom the Mitákshará and *Smriti Chandriká* are the chief authorities, it must be held that the disposal by will (considered as gift) of an undivided share of joint-property is not valid; nor of any part of it, unless for pious purposes, or other uses incumbent on the testator to provide for, and falling within the exception which the law makes to the general prohibition." As to gift see also, Stra. H. L. 261.

The High Court of Madras has adopted the views of Mr. Colebrooke, Mr. Ellis, and Sir Thomas Strange (and the decision of the

latter at Madras in *Sashachella Pillay* v. *Rama-sámy*, already mentioned by us) as to the validity of an alienation, for valuable consideration, of the share of one of several co-parceners in a Hindú undivided family.

In *Vira-svámi Grámini* v. *Ayya-svámi Grámini*,* Sir C. Scotland, C. J., and Bittleston, J., held, at the Original Jurisdiction side, that one member of an undivided family may alien his share of the family property, and that there may be a valid sale of such a share upon an execution in an action of damages for a tort. The judgment, there delivered, shows that the Supreme Court and the Sudder Dewany Adawlut respectively of Madras had acted upon the same doctrine. Frere and Holloway, J. J., in *Palanivelappa* v. *Mannaru*,† held that a sale by a father is valid by Hindú law to the extent of his own share of the undivided estate, and that according to the Madras school there is no distinction in this respect between a father and other co-parceners. In their judgment, they say—"The principle, upon which, following the suggestion of Sir Thomas Strange and Mr. Colebrooke, the courts have of late years satisfied the contract of one individual member out of the share which would have come to him on partition, is that as the co-parcener has contracted he ought to fulfil his contract, that if he could, if disposed, at any time, according to the Madras school, enforce a partition, it is only just that when he has incurred an obligation, he shall not be allowed to escape its effects by the allegation that his own deed was *ultra vires*; but compelled to give to his creditor all the remedies to which he would himself be entitled as against the object matter of his agreement."

The Mithilá and Benares Schools, however, interpret the *Viváda-chintámani* and the Mitákshará as declaring the invalidity of alienation, for valuable consideration, even of his own share, by one parcener without the assent of the others. Upon that view, the High Court at Calcutta (following several previous decisions of the Calcutta Sudder Dewanee Adawlut, and one in the North-Western Provinces,) has acted in cases coming before it, in its appellate jurisdiction, from provinces where the law of the Mitákshará

* 1 Madras H. C. Report, 471. *Ante*, p. 139.
† 2 Madras H. C. Report, 416. *Ante*, p. 144.

prevails.—*Cosserat* v. *Sudaburt Pershad Sahoo,** *Sudaburt Pershad Sahoo* v. *Foolbash Koer,*† and *Hanuman Dutt Roy* v. *Kishen Kishor Narain Sing,*‡ both of which last decisions were made by a Full Bench. Sir B. Peacock, referring to the previous decisions upon that question at that side of India, and to the well-known passage in the judgment of the Privy Council in *Appoovier* v. *Rama Subba Aiyan,*§ said, in *Sudaburt Pershad Sahoo* v. *Foolbash Koer*:‖ "We are called upon to decide this case according to the Mitákshará law as we find it, and not according to our own views of policy. Whatever our opinions might be, in the absence of the decided cases to which I have referred, I am of opinion that we should not be justified in unsettling the law by over-ruling the current of authorities, by which, for nearly half a century, the law appears to have been settled, and in accordance with the principles of which it appears to have been generally understood and acted upon," and held accordingly that one parcener "had no authority, without the consent of his co-sharers, to mortgage his undivided share in a portion of the joint-family property, in order to raise money on his own account, and not for the benefit of the family."

Previously to adverting to the Bombay authorities, we may notice that in a recent case before the Privy Council from Oude, *Syud Tuffuzzool* v. *Rughoo-nath Persad,*¶ Lord Justice James, in giving the judgment of their Lordships and speaking of a share in undivided Hindú property, said: "Mr. Leith referred in his argument to the family property of Hindús, and urged that such a share in such property may be attached and sold in execution. No doubt that such a share is property, and that a decree-holder can reach it. It is specific, existing, and definite; but it is not properly the subject of seizure under this particular process, but rather by process direct against the owner of it, whether by seizure or sequestration, or appointment of a receiver. In the present case the attachment, as it has been observed, is not of the antecedent share in the undivided assets. It is of a claim under a future award, as to which it is wholly uncertain, until the award be made, to what the debtor will be entitled."

* 3 Cal. W. Rep. 210. *Ante*, p. 36.
† 3 B. L. Rep. 31 F. B. *Ante*, p. 149.
‡ 8 Bengal L. Rep. 358. *Ante*, p. 160.
§ 11 Moo. Ind. App. 75.
‖ 3 Bengal L. Rep. 45 F. B.
¶ 14 Moo. Ind. App. 40.

As a general proposition, it is true that, in this Presidency, the **Mitákshará**, where not differing from the *Mayúkha*, is usually followed by the courts upon questions of Hindú law. But this rule is not invariable. The courts have, in some instances, declined to follow either of those works. The doctrine of Mr. Colebrooke, Mr. Ellis, and Sir Thomas Strange, as to the right of alienation for valuable consideration by one of several co-parceners of his share in undivided Hindú family estate without the assent of the others, has been here preferred to that of the *Mithilá* and Benares schools; and, as a logical consequence of that doctrine, the courts have recognized the right of a judgment creditor to take in execution, for the private debt of a parcener, his share in such undivided property.

Steele, who is an authority in this Presidency, seems, at p. 210 of his work, 1st edition, to take much the same view of alienation as Strange and Colebrooke.

We have succeeded in finding only one case, amongst the reports of cases in this Presidency, in which the non-alienability of a parcener's share was maintained. That is *Bellojee* v. *Venkappa.**

In subsequent cases, it appears that the Bombay Sudder Adawlut, although holding that the purchaser of the share of a parcener in Hindú family property cannot, before partition, sue for possession of any particular part of that property, or predicate that it belongs to him exclusively, yet was of opinion that he may maintain a suit for partition, and thus obtain the share which he has purchased: *Sada-sew* v. *Bapooji*,† *Jiwan* v. *Gunnoo*.‡

The High Court at its appellate side (Kinloch, Forbes, and Tucker, J. J.) held in *Gundo* v. *Rám-bhat*,§ that a member of a Hindú undivided family may mortgage his own share of the family estate, and that, if he were acting as manager of the undivided family, he may mortgage the shares of the other members of the family on any common family necessity, or for the general benefit and use of the family. The right of one member of an undivided Hindú family to sell his own share was maintained by Kinloch, Forbes, and Erskine, J.J., in *Damodhar Vithal* v. *Damodhar Hari*.‖

* Select Ca. S. D. A. 243.
† 4 Morris S. D. A. Rep. 145.
‡ 9 Harr: S. D. A. Rep. 555.
§ 1 Bombay H. C. Rep. 39. *Ante* p. 39.
‖ Ibid., p. 182. *Ante*, p. 146.

In *Tuká-ram* v. *Ram-chandra,** Melvill and Warden, J.J., in 1869, held distinctly that, at this side of India, a member of an undivided Hindú family can, without the consent of his co-parceners, sell his share in the undivided property. They distinguished the case of a sale, as that was, from the case of a gift, which, in *Gangubái* v. *Rámanná,*† it was held that a Hindú parcener could not make gift of his share in undivided property without the consent of his co-parceners. The case of a gift (either testamentary or *inter vivos*) is clearly different from that of a transfer or charge made for valuable consideration; and we have already seen that Mr. Colebrooke distinguishes the former from the latter. We are not aware of any instance, at this side of India, in which, without the consent of the heirs, a testamentary gift of the share of a parcener in undivided property has been upheld.‡ I have frequently refused to recognize such devises, and am aware that other Judges have pursued the same course.

During the nineteen years and upwards of my acquaintance with the Island of Bombay, I can affirm that the right of a parcener to sell, mortgage or otherwise alien, for valuable consideration, his share of Hindú undivided property, has uniformly been recognized in that Island, originally in the Supreme Court, and, since its abolition, in the High Court at its original jurisdiction side; and according to the tradition, which existed amongst the senior members of the Legal Profession whom I found here in 1854, that doctrine had been acted upon in this Island from a time anterior to the opening of the Supreme Court in 1824.

In accordance with that tradition was the decision in *Maccundass* v. *Gunpat-rao,*§ where, subject to the claims which other members might have on the undivided family estate, the right of one member to mortgage his share was recognized and that of the mortgagee to maintain a suit against the other co-parceners for partition.

We next proceed to mention the authorities here as to the right to take in execution, for his private debt, the share of a parcener in the undivided estate of a Hindú family.

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* 6 Bombay H. C. Rep. A. C. J. 247. *Ante*, p. 146.
† 3 Bombay H. C. Rep. A. C. J. 66. *Ante*, p. 146.
‡ Note.—Acc. 2. Borr. R. 7, 515, Reprint of 1862-63.
§ Perry's Or. Ca. 143.

The plaintiff in *Sheo-chund* v. *Nihal-chund,** a suit brought in 1817, did not, by his plaint, venture to deny that his co-parcener's (Dhoollubh's) share was lawfully attached, but sought for exemption of his own share only from attachment.

In *Duyá-shunker* v. *Brij-vullubh*† an attachment against a parcener's share in undivided property, was upheld.

Hurree-dass v. *Ghirdur-dass,*‡ is another instance of an attachment against a parcener's share in undivided property being upheld.

In *Ram and Gunesh Sabashet* v. *Rughoo-veer,*§ the Sudder Dewany Adawlut upheld an attachment against the share of one of three co-parceners for his private debt, and, after a reference to the *Shástrí,* laid it down that a division of property may be enforced to satisfy a judgment creditor.

In *Suda-shew* v. *Gunesh and Ram Sabashet,*‖ the same court permitted an attachment of the whole of the family property, but directed that, on a sale thereof, one-third of the proceeds, or so much of such one-third as might be necessary, should be paid to the judgment creditor of one of the parceners, and that the remaining two-thirds should be paid over to the other two parceners.

The same doctrine was enforced by the same Court in *Mulhar Kundo* v. *Rowjee and Luximon,*¶ *Devi-chund* v. *Yemajee,*** *Jejee-bhaee* v. *Jejeebhaee,*†† *Motee-ram* v. *Sham-jee,*‡‡ *Bhagoo* v. *Hunumunt-ram.*§§

There is a consistency in that doctrine with the liability of the deceased father's estate in the hands of his sons or others to pay his creditors as laid down in the Mayúkha, Chapter V, Section 4, Pl. 14, 16, 17, 19, and in the passage quoted by Sir B. Peacock from the Mitákshará on the payment of debts published by Mr. Roer and Mr. Montriou, text No. 51, above-mentioned. We are not, however, to be understood as saying that the liability amounts to a lien (see 9 Bombay H. C. Rep. 116.)

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* 1 Borr. 329.
† Select Ca. S. D. A. 43.
‡ Select Ca. S. D. A. 46.
§ 1 Morris S. D. A. Rep. 9.
‖ 1 Morris S. D. A. Rep. 18.
¶ 1 Morris S. D. A. Rep. 75.
** 3 Morris S. D. A. Rep. 1.
†† Ibid. 146.
‡‡ Ibid. 151.
§§ 7 Harrington's S. D. A. Rep 135

On the principle *stare decisis,* which induced Sir Barnes Peacock and his colleagues strictly to adhere to the anti-alienation doctrine of the Mitákshará in the provinces subject to their jurisdiction where the authority of that treatise prevails, we at this side of India find ourselves compelled to depart from that doctrine, so far as it denies the right of a Hindú parcener, for valuable consideration, to sell, incumber, or otherwise alien his share in undivided family property. The foregoing authorities lead us to the conclusion that it must be regarded as the settled law of this Presidency, not only that one of several co-parceners in a Hindú family may, before partition, and without the assent of his co-parceners, sell, mortgage, or otherwise alien, for valuable consideration, his share in the undivided family estate, movable or immovable, but also that such a share may be taken in execution under a judgment against him at the suit of his personal creditor.* Were we to hold otherwise, we should undermine many titles, which rest upon the course of decision, that, for a long period of time, the courts at this side of India have steadily taken. Stability of decision is, in our estimation, of far greater importance than a deviation from the special doctrine of the Mitákshará upon the right of alienation.

It remains for us to dispose of the second point, namely: whether the deed of sale (exhibit 9) was executed by the second defendant to the first defendant for valuable consideration. As already stated by us, we must, on the facts as found by the District Judge, hold that the sum of Rs. 3,500, the alleged consideration, was paid voluntarily by the first defendant to the second defendant without any previous request from the latter, and "merely to save the reputation of the family." A moral obligation is not a sufficient consideration to uphold a promise: *Eastwood* v. *Kenyon.*†

On these grounds, we affirm the decree of the District Judge with costs, and with a declaration that only the right, title, and interest of the second defendant, Munj-nath Bhat, can be sold under the attachment of the three houses mentioned in the plaint.‡ Decree affirmed.—Bom. H. C. Rep. Vol. X., pp. 139—162.

* The same law had been laid as to Muhammadans—2 Morris S. D. A. Rep. 99, 276, 284; Select Cas. S. D. A. 46.

† 11 Ad. and E. 438.

‡ See the next case.

Held by a Full Bench, following the doctrine laid down in the preceding case, *Vásu-dev Bhat* v. *Venkatesh Sanbháv,* that a Hindú parcener may, without the consent of his co-parceners, alienate his share in undivided family property.—*Fakirápá bin Satyápá, Appellant. Chanápá bin Chanmalápá, Respondent.*

Tuká-rám v. *Rám-chandra* (6 Bom. H. C. Rep. A. C. J. 247) approved and adopted. *Bajee* v. *Pandoorung* (Morris Part II. 93) disapproved.

Bom. H. C. Rep. Vol. X., p. 162.

CALCUTTA, HIGH COURT.

Present:

The Honorable F. B. Kemp and F. A. Glover, *Judges.*

NUTHOO LAUL, *versus* CHEDEE SHAEE, and others.

In a suit by sons and grandson of one Nirbhoy Singh to set aside the sale by Nirbhoy Singh of a part of the ancestral estate to Soamber Singh, whose rights and interests in the estate were purchased at auction by the defendant Nuthoo Laul, it was held, that the cause of action to the sons would accrue, and limitation run, from the date on which Soamber got possession from Nirbhoy.

Held, that the consent of the elder brother (alone) would not make the transfer valid, inasmuch as by the Mitákshará law the consent of all the share-holders would be necessary to the alienation of his own share.

Held that as the purpose to which the purchase-money was applied was to meet an obligation purely personal to Nirbhoy Singh, and as the sale in no way benefited the estate, the sale was illegal, and purchaser had no right to a refund of the purchase-money.

Glover J.—This was a suit by the sons and grandson of one Nirbhoy Singh to set aside a sale made by their relative to the defendant Soamber Singh, on the ground that it was effected without their consent and was not justified by any such necessity as the Hindú law allows.

The property sold consisted of a two anna share of mouzah Sabaspore and it is admitted that it formed part of the ancestral estate of the family.

The defendant Nuthoo Laul Chowdhry, the purchaser at auction of Soamber's rights and interests in the estate, defended the suit on the ground, *first,* that the claim was barred by limitation; and *second,* that *Nirbhoy* was justified in selling to Soamber by reason of necessity.

It appears to us absolutely immaterial to determine the nature or extent of Muddun's possession, as it is clear from the record that Nirbhoy came again into possession after the arrangement with Muddun, and it was against Nirbhoy that Soamber got a decree for possession in March, 1856. The adverse possession commenced, therefore, from the date on which Soamber got possession from Nirbhoy, and on this calculation the plaintiffs are just within twelve years.

Then as to the *necessity* for the sale. The money is said to have been raised to pay a demand of Government against Nirbhoy as security for the former of certain ferry tolls. There is no denial on the part of the defendant as to the purpose to which the money was applied, and we think it quite clear that this obligation was purely one of a personal character and could not be got rid of by laying it upon the estate. It was Nirbhoy's personal liability, and he had no right to burthen his family with it. But it was agreed that even if there were no proved necessity, still as Chedee, the eldest son, was of age, when the transaction was entered into, and made no objection to it, his consent to the sale should be implied; and that as the other sons have allowed many years to elapse since the transfer, they must also be considered as having agreed to the sale.

With regard to the last part of this argument, we remark that all the younger sons of Nirbhoy were admittedly minors at the time of the sale to Soamber, and there is nothing on the record to show that they have even now attained majority, and we cannot imply consent under such circumstances.

As to the elder brother Chedee. Even if it be admitted that his silence is equivalent to a consent to the sale, that consent would not make the transfer valid, inasmuch as by the Mitáksharâ law, the consent of *all* the share-holders would be necessary even to the alienation of his own share.

Then as to the *refund* of the purchase-money. It has been ruled by the Full Bench in the case of Madhoo Dyal *versus* Golbar Singh and others (IX Weekly Reporter 511*), that there must be proof of certain circumstances before a purchaser can have an equitable right to compel a refund, and these circumstances are stated to be that the purchase-money went to the benefit of the estate, and that in that way the sons got a direct advantage from it. In this case, as we before remarked, money paid by Soamber was applied by Nirbhoy to his own personal necessities, and in no way benefited his estate; and as Soamber, if he were in possession, would have no right to a refund, neither can Nuthoo Laul have such right, as he can stand in no higher position than the party whose interests he purchased.

Nor can he, we think, retain possession of Nirbhoy's share, nor get back such portion of the purchase-money as would be represented by that share, inasmuch as the estate being joint and undivided, Nirbhoy had no right to burthen or alienate even his own share without the consent of *all* his co-sharers. The ruling of the Full Bench in the case of Mussummat Phool-basoo Kower *versus* Mussummat Parbutty Kower dated the 30th of July 1869, disposes of this point adversely to the defendant.

Neither can we take cognizance of the fact of the defendant's being an innocent auction-purchaser. He had every opportunity of making enquiry and must have known the extreme danger of purchasing an interest which had been originally bought from a single member of a joint undivided family being under the Mitákshará law.

The order, therefore, we make in this case is, that the plaintiff's suit to have the sale to Soamber set aside as illegal be decreed as regards all the co-sharers, and that the Additional Judge's order regarding the retention by the defendant of Nirbhoy's share and the refund of purchase-money by Chedee be set aside.—S. W. R. Vol. XII, p. 446.—B. L. Rep. Vol. IV, a. c. p. 15.

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* Ante, page 151.

CALCUTTA, H. C.—*The* 13*th of March*, 1875.

Present:

The Hon'ble J. B. Phear and G. G. Morris, *Judges.*

Cases Nos. 11, 32, and 49 of 1873.

Regular Appeals from a decision passed by the 1*st Subordinate Judge of Bhaugulpore, dated the* 27*th of September*, 1872.

MUDDUN GOPAL LALL and others, (Defendants,) Appellants,

versus

MUSSAMAT GOWRUN-BUTTY and others, (Plaintiffs,) Respondents.

The interest which, under the Mitákshará law, a son acquires in the ancestral property of his father, by, and in the event of, being born, is of the nature of an inheritance and remains liable to the payment of the personal debts of the father, even though subsequently contracted, in the same way as the entire property would have been, had the son not been born; except only in the case in which those debts are illegal, or were contracted for an immoral purpose.

Accordingly any disposition of the property which is reasonably made by the father, for the purpose of discharging a debt of the father's, which does not fall within the exception, is one of those spoken of and authorized as "unavoidable" by the Mitákshará, Chap. I, Sec. I, paras 28 & 29.

Phear, J.—It appears to be admitted that Shib Narain Singh, the first defendant, and his elder son, the second defendant, and his younger sons, the minors, plaintiffs, together constitute a joint family living in commensality under the Mitákshará law, and in the joint enjoyment of the property which is the subject of suit.

With regard to *all* three appellants, it may be reckoned as certain from their written statements and from the evidence that they knew the joint family consisted of more members than Shib Narian and Amur Pershad, but they advanced money to, and dealt with, Shib Narain and Amur Pershad as being the only adult members of the family; and they were ultimately content to take such security for repayment of the money as Shib Narain and Amur Pershad alone could give them in the shape of a mortgage for charge upon the family property.

Consequently, the three cases may be summarized thus:—In that of Muddun Gopal the plaintiff's father and elder brother mortgaged 8 annas of the joint property to Muddun Gopal in consideration of a loan of money which was wanted for a family purpose.

In those of Girdharee Lall and Poosun Lall, putting them at their highest, the plaintiff's father and elder brother mortgaged 8 annas of the joint property in order to prevent the sale of that property at the instance of Girdharee Lall and Poosun Lall in execution of decrees which those persons had respectively obtained against the father and eldest son personally.

The plaintiff's case then is reduced to this, namely, are the minor sons, the plaintiffs, entitled to insist on partition of the joint property and to obtain their shares of the joint property free of these mortgages? In a late case reported in XX Weekly Reporter, 336,* we had occasion to discuss the first part of this question at considerable length. the result at which we arrived was that the sons could at any time during their father's life call upon him to partition the *ancestral* property. And as to the 2nd part of the question, it was also made clear in the course of the discussion that under the Mitákshará law, the occurrence of the birth of a son had the effect of limiting the father's power of disposition over ancestral property. While he could before the birth of a son deal with it as sole owner, after that event he becomes in a certain sense subject to the control of his son who by birth becomes co-owner with him,—with this further condition, however, that during the minority of his son he has an absolute discretion within certain limits.

Those limits are prescribed in paragraphs 28 and 29 of Sec. i, Chap. I, Mitákshará. They are expressed no doubt in these paragraphs in somewhat general terms, and this court is constantly called upon to decide whether a given case comes within them or not. The judgment of the Privy Council in Honooman Pershad Pandey's case (VI Moore's Indian Appeals) has been applied by analogy and considered to furnish a guiding principle upon this point. Since, however, the present appeal first came before this court, a decision has been passed by the Privy Council, which is even more immediately relevant, namely, the decision reported in XXII Weekly Reporter, 56.†

* See post, pages 181 & 182. † See *Ante*, page 72.

According to that decision as we understand it, the interest which under the Mitákshará law a son acquires in the ancestral property of his father, by, and in the event of, being born, is of the nature of an inheritance, and remains liable to the payment of the personal debts of the father even though subsequently contracted in the same way as the entire property would have been liable had the son not been born, except only in the case where those debts are illegal or were contracted for an immoral purpose. The judgment says expressly the interest of the "sons, as well as the interest of the fathers in the property, although it is ancestral, is liable for the payment of the father's debts."

It would therefore seem to follow that any disposition of the property, which is reasonably made by the father for the purpose of discharging a debt of this kind, *i. e.*, a debt of the father's which does not fall within the exception, is one of those spoken of and authorized as "unavoidable" by paragraphs 28 and 29, Section i, Chapter I, Mitákshará.

The debt being of such a nature that the property is ultimately liable to discharge it, the alienation of that property, whether by mortage or sale by the father upon reasonable terms for the purpose of discharging the debt, must be substantially an unavoidable transaction.

In the case of Muddun Gopal, the debt was incurred for a family purpose; and in the other two cases, they were debts, the reality of which has, so to speak, been guaranteed by a decree. It must be taken, as long as those decrees are unimpeached, that there really was a debt from the father and his eldest son to Poosun Lall and Girdharee Lall respectively. The debts then being apparently real debts, and not of an immoral character, and one of them being incurred for a family purpose, it follows that they were of such a nature that the joint property of the family was liable to meet them. And that therefore the mortgages which the father has made for the purpose of securing these debts to the defendants, appear upon the authorities which have been quoted to be good incumbrances upon the joint estate, and valid against the claims of the minors, the plaintiffs.

We thus think that while the plaintiffs are no doubt entitled to have a partition of the property, the partition must be subject

to the mortgages of the three appellants to the extent of 8 annas of the entire property.

The appellants are entitled to their costs; but as we cannot give a decree making the minors pay the costs, these costs will be declared a charge upon the property.—S. W. Rep. Vol. XXIII, pp. 365—367.

AGRA, S. D. A.—*The 1st of June,* 1864.

Present:

J. H. Batten, Esq., and C. R. Lindsay, Esq., *Offg. Extra Judges.*

Case No. 85 of 1863.

BABOO AJOODHIA SINGH and others, (Plaintiffs,) Appellants,

versus

BABOO SUMRUT SINGH, (Defendant,) Respondent.

Held that a Hindú in sole proprietary possession of a share in an estate, which has been partitioned, in the absence of male issue, may alienate his property as he pleases. Held, also, that in this suit the alienation was made *boná fide*, and for valuable consideration.

This is a suit, *in formá pauperis* for a declaration of a proprietary title in, and for possession of, certain shares in 21 villages named in the plaint, and to set aside five deeds of sale whereby the said property was conveyed to the defendant by Baboo Inder-dawun Singh, deceased; also to recover mesne profits amounting to Rs. 45,693,—total value of the claim Rs. 47,857.

The plaint sets forth that the litigants are the descendants of a common ancestor, who acquired the property in dispute; that the property is a joint undivided estate, and that Inder-dawun, under these circumstances, was not competent to alienate it. It is contended that the alienation was not a *boná fide* sale of property for valuable consideration, and that at the period of the execution of the deeds, Inder-dawun was not sane, he being afflicted with a disease which rendered him incompetent to think and act for himself.

The defence set up is, that Inder-dawun at the period of the sale was well able to conduct his affairs, and that the property being

his divided share of the ancestral estate, he was competent to alienate it to whom he pleased, he having no male issue. The sale was *bonâ fide* for valuable consideration. The Lower Court has decided against the plaintiffs.

Judgment—

There are three issues for determination in this case:—

1st.—Was the property in dispute part of a joint undivided estate, or was it the separate divided share of the deceased Inder-dawun?

2nd.—Was Inder-dawun in his right mind when he made the alienation, and was he legally competent to execute a deed of sale?

3rd.—Was valuable consideration given for the property?

Regarding the first, there is incontestable documentary and oral evidence that the plaintiff Ajoodhia Singh and Inder-dawun Singh partitioned off their ancestral shares, and held separate possession of the land so divided. In fact the Counsel for the appellants had not a word to say on the point, for the Government records, and Ajoodhia's petition dated 1st February 1849, precluded any argument. The non-payment of the consideration, and the incompetency of the deceased Inder-dawun, by reason of disease, to execute the deeds, are the points in favor of the plaintiffs upon which their Counsel rely. Now, we observe that there is no proof that Inder-dawun was so ill that he could not exercise his faculties. On the contrary, there is good evidence for believing that, though suffering from a severe disease, he was fully able to use his mental faculties. The disease was not of a nature to prevent the free exercise of the mental faculties, though very likely it did materially affect his physical powers. Moreover, Inder-dawun lived about 15 months after the execution of the deeds. Had they been collusively prepared without his knowledge, he certainly, during that term, would have heard about the fraud. But so far from being a collusive transaction, it is on record that Inder-dawun petitioned the Collector for the mutation of names in favor of Sumrut Singh, and presented himself to the Tehseeldar who had been directed to verify the petition.

We have no doubt that Inder-dawun did, of his own free will, convey the property to the defendant. Then, as to the consideration, the property was conveyed to the defendant for Rs. 50,000. Part of

the consideration was paid in cash, part was set off against old debts due to, or on account of, the defendant, and other claims on the seller. Rs. 7,200 were paid off in cash. We think there is sufficient evidence proving the payment of valuable consideration; and even supposing that the whole sum of Rs. 50,000 was not paid, such fact would be no bar to the validity of the sale.

In the fourth plea, the appellants urge that a childless Hindú cannot alienate his property when a legal heir is present.

The assertion is true as regards undivided joint property, but when a partition of land has taken place, a several right arises according to the doctrine of the Mitákshará, current in these provinces, and the Counsel for the Appellants has verbally allowed that the plea is weak, for, if the consideration be proved, the alienation, it is granted, is not contrary to Hindú Law.

We do not think that the non-production of the deeds of sale, or the non-registration of such important deeds, materially affect the issue of the case.

The appellants on their pleadings allow that the deeds were executed, but contend that they are false documents.

Now we fail to perceive that the production and inspection of these documents would have proved their falseness. It is fairly presumable that, had the documents been producible the defendant would have filed them in Court.

We affirm the decision of the Lower Court, and dismiss this appeal with costs.—Agra. S. D. A. Dec., for 1864, p. 545.

Ram-anoograh Sing, the *kartá* of a Hindú family, governed by the Mitákshará law, living with his two sons Maha-beer Persad and Sheo-nundun Persad in joint enjoyment of the family property, took a loan from certain persons, and executed to them a mortgage by a bond of the joint family property. The bond-holders obtained a decree on their bond, in execution of which they caused the property to be sold, and themselves became the purchasers. Sheo-nundun Persad was a minor at the time of the alienation. In a suit by Maha-beer Persad on behalf of himself and Sheo-nundun Persad to set aside the alienations—on the ground that it had been

made without their consent and without legal necessity, the court found that Maha-beer Persad had taken such a part in the transactions leading to the alienation as made him a consenting party to it; that there was no legal necessity for the alienation; and that Sheo-nundun being a minor, the alienation was not the joint act of *all* the members of the family.

Held, that under these circumstances the alienation failed to convey to the purchasers either the entirety of the property or any share or interest in it, and Sheo-nundun was entitled to have it set aside. In ordering the alienation to be set aside, the court in the interest of the minor son, and favoring the equity the purchasers clearly had against Ram-anoograh Singh and Maha-beer Persad directed that, on recovery of the property, it would be held and enjoyed in defined shares, and that the shares of Ram-anoograh Singh and Maha-beer Persad should be jointly and severally subject to the lien thereon of the purchasers for the repayment of the loan to Ram-anoograh Singh.

So long as a Hindú family under the Mitákshara law is living in the enjoyment of the family property, without having come to an actual partition among themselves of that property, or an ascertainment and partition of their rights in it, no member of the family has any separate proprietary right therein which he can alien or incumber. The property can only be alienated by the joint act of *all* the members express or implied; or, in case of justificable family necessity, by the *kartá* alone.

Upon a partition of ancestral property between a father and his sons during the life-time of the father, the mother is, under the Mitákshará law, entitled to a share.—*Maha-beer Persad* v. *Ram Yad Singh* and others.*—B. L. R. Vol. XII, p. 90.—S. W. R. Vol. XX, page 336.

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* This decision is given in extenso in the Book on Partition.

CALCUTTA H. C.—*The* 11*th December* 1869.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,*
and the Hon'ble G. Loch, *Judge.*

Case No. 228 of 1865.

RAJARAM TEWAREE and others, (Defendants,) Appellants,
versus
LUCHMUN PERSHAD and others, (Plaintiffs,)
Respondents.

Plaintiff, on behalf of himself and his minor brother, as sons and heirs of Jeetun Lall deceased, sued to recover possession of certain lands being ancestral property, by reversal of certain deeds of absolute and conditional sale alleged to have been executed without any necessity. The deeds were executed by Jeetun Lall and his brother O, but the plaintiffs' claim was confined to the one-half share alleged to have belonged to their father Jeetun Lall. The property was subject to the Mitáksharâ Law.

Held, that as the family was not separated, nor the property partitioned, the suit should have been brought by all the joint owners to set aside the deed as to the charge created by O, as well as to the charge created by Jeetun Lall.

Held, that if plaintiffs' case were sustainable in other respects, it would be necessary to try the issue whether the persons who advanced the money did, after due enquiry into the necessities of the father and uncle, act honestly in the belief that a sufficient necessity existed for taking up the money for the benefit of the family.

Held, that if a larger sum was borrowed or raised than was legally necessary, or a larger portion of the estate mortgaged or sold than was necessary to raise the sum legally necessary, the vendees or mortgagees would be entitled to a charge upon the lands mortgaged or sold to the extent of the money required and taken up for purposes recognized by Hindú Law.

In a case where the plaint sought to set aside the deed *in toto,* on the ground that the whole of the money was used by the father

for his own extravagance, the Court might, upon the defendants establishing a necessity for part of the loan, decree that the deed should be set aside, and the plaintiff recover possession, upon his paying the amount which was legally taken up for necessary purposes, or that the deed should be set aside in proportion.—S. W. R. Vol. XII, c. r. p. 478.

It is incumbent on the vendee or mortgagee to give proof not only of the consideration money for the sale or mortgage having been *bonâ fide* advanced in discharge of an antecedent debt, but also of an enquiry productive of results which warranted his reasonably believing that such debt was a family obligation, and the sale or mortgage a prudent arrangement for its discharge.—*Taravana Tevan* v. *Mulayi Ammal Tirumalae Guandan.*—Mad. H. C. Rep. Vol. VI, p. 371.

By Hindû law the burthen of showing what separate property consists of lies upon the person who alleges the property to be separate.

A person lending money on the security of the property of an undivided family is bound to make enquiries as to the necessity that exists for such loan. If he lends the money after reasonable enquiry, and *bonâ fide* believing it will be properly expended, he is not bound to see to the application of it. The rule is the same whether all the members of the family are adults or minors.—*Gane Bhive Parab et al.* v. *Kane Bhive et al.*—4 Bom. Rep., a. c. j. page 169.

When a person who claims property on the allegation that he purchased it from a person to whom it exclusively belonged, fails to prove that the property was the separate property of his vendor, he cannot have a decree for the share of the property to which his vendor was entitled as a member of a joint-family.—*Gour Behary Ram Bhugut* v. *Sheo Ruttun Coonwur* and others.—S. W. Rep. Vol. X, p. 243.

Admitted legal opinions.

The sale by the managing partner of an entire estate is valid in a case of necessity.

Q. There were three uterine brothers in joint possession of some ancestral landed property. One of them staid at home to conduct the affairs of the family, and superintend the estate, and the other two proceeded to a foreign country to obtain office. In this case, is the brother, who manages the estate, entitled to sell or mortgage the property for a certain term, while the other brothers are at a distance ?

R. If two of the three associated brothers, having left a brother at home to manage their joint property, proceeded to a distant country to obtain office, the managing brother may mortgage and sell the whole or a part of the undivided patrimonial property for the support of the family and religious purposes, even though there be no consent on the part of his co-parceners ; in like manner as he may, without his brothers' sanction, dispose of his own share for the maintenance of his own dependants. This is conformable to the *Dáya-bhága*, *Dáya-krama-sangraha*, and other legal authorities.*

Authorities.

"But if the family cannot be supported without selling the whole immovable and other property, even the whole may be sold or otherwise disposed of."—*Vrihat Menu.* "The support of persons, who should be maintained, is the approved means of attaining heaven: but hell is the man's portion, if they suffer. Therefore (let the master of a family) carefully maintain them." This is the doctrine contained in the *Dáya-bhága.*

"Should even a slave make a contract *in the name of his absent master* for the behoof of the family, that master, whether in his own country or abroad, shall not rescind it."

"The term 'contract' means sale and the like."—*Dáya-krama-sangraha.*

"But, at a time of distress, for the support of his household, and particularly for the performance of religious duties, even a single co-parcener may give, mortgage, or sell the immovable estate."

* Namely,—the *Viváda-Chintámani* and other authorities current in the Mithila, Benares and other schools.

"If a debt be incurred by a slave for the support of the family of his master, it must be discharged by the master." This is the opinion of the author of the *Vivâda-chintâmani*.—Macn. H. L. Vol. II, Chap. XI, Case x.

According to the law as current in Orissa, the sale of a portion of joint property is void.

Q. A family, consisting of three brothers, held a patrimonial landed estate in joint tenancy, the eldest of whom, without coming to a partition, sold a moiety of the estate, with the consent of his youngest brother, but without the consent of the second brother. In this case, is the eldest brother competent to sell such property; and if it be sold, is the sale good and valid, according to the law as current in Orissa?

R. The eldest brother is incompetent to sell one-half of the joint patrimonial real estate without coming to a partition, or defining his legal share, having only the sanction of his youngest brother; and the sale in such case is null and void.—*Zillah Midnapore, March 15th*, 1813.—Macn. H. L. Vol. II, Chap. XI, Case xvi.

A sale by one partner of an undivided estate, if justified by necessity, is good and binding upon the other partners.

Q. A, B, and C are three brothers, proprietors of an undivided landed estate. A dies, leaving a son D; B dies, leaving a son E; and C dies, leaving a son F. F dies, leaving four sons. On the death of A, the estate was registered in the name of D; and during the minority of the sons of F, it was about to be sold by public auction on account of arrears of revenue. With the view of saving the estate, D, in concert with E, made a mortgage and conditional sale of it to a stranger, and the conditional sale ultimately became absolute, in consequence of the money borrowed not being repaid to the mortgagee within the stipulated period. Now the heirs of F have sued to recover their share, alleging that the sale took place without their consent and during their minority. Is such sale, made during the minority of the heirs of F, valid according to law?

R. D and E being the elder brothers of the family, and managers of the affairs, and having disposed of the property in a time of distress and through necessity, such act is valid; and here the sale is good, because the estate was disposed of to prevent its being sold by public auction.

Authorities.

"Even a single individual may conclude a donation, mortgage or sale, of immovable property, during a season of distress, for the sake of the family, and especially for pious purposes." The text of *Yájnyavalkya* cited in the *Mitákshará*, *Kalpa-taru*, and other authorities current in Behar.—*Zillah Shahabad, April 1st*, 1820.

Heirs of Goodree Singh *v.* Gooman Singh and Bustee Singh. Macn. H. L. Vol. II, Chap. XI, Case xx.

Circumstances under which three brothers can effect the sale of an estate without the consent of the widow of the fourth brother.

Q. A landed estate was purchased jointly by A and B. The latter died, leaving his four sons, namely C, D, E, and F. Subsequently to B's death, one of his sons, F, died leaving a widow. Afterwards the surviving three uterine brothers (C, D, and E,) and A sold the whole estate. In this case, is the sale of such property, without the sanction of F's widow, valid and binding, or not? And has the widow any right over it, or is she only entitled to food and raiment from her husband's brothers?

R. Supposing F to have been separated from his brothers by obtaining a division of the estate, and then to have died, in that case, his widow is entitled to his estate. If no separation between F and his brothers took place, or if he, having separated from his brethren, be re-united with them, his widow can only have her maintenance from her husband's brothers until her death. If after partition there was a re-union with one only of the brothers, the re-united parcener is alone bound to provide his co-parcener's widow with maintenance; and under these circumstances, the widow's consent is by no means necessary to the validity of the sale.

Zillah Moradabad, April 27th, 1813.—Macn. H. L. Vol. II, Chap. XI, Case xxiii.

According to the Hindú law as current in Tirhoot, a gift of joint-property is invalid. And *Birt* profits are unalienable.

Q. 1. Is it lawful to make a gift of joint undivided property, whether real or personal, according to the law current in Tirhoot?

R. I. A gift of joint undivided property, whether real or personal, is not valid, even to the extent of the donor's share; for property cannot be sold or given away until it is defined and ascertained, which cannot be done without a division.

Authorities.

"Partition *(Vi-bhága)* is the adjustment of divers rights regarding the whole, by distributing them on particular portions of the aggregate."—Mitákshará.

Q. 2. Is the *Birt Mahá-brámini*, or profits arising from the levy of sacrificial fees, a fit subject of transfer? and supposing such profits to be enjoyed jointly by several of the class of persons denominated '*Mahá-bráhmins*,'* is it lawful for any one of the co-parceners to transfer his share, either by sale or gift?

R. 2. The profits of the *Birt Mahá-bráhmini* do not constitute a fit subject of transfer, and no one of the sharers in the joint profits of the *Birt* is at liberty to transfer to another person his own interest therein: even if the profits had been divided, the same prohibition would apply, inasmuch as the sacrificial fees, which constitute the *Birt*, are only fit to be received by the officiating priests, to whom they were offered; and the purpose of the offerings, —namely, the spiritual welfare of deceased ancestors, would be defeated by the alienation.

Authorities.

"Having assembled eleven *Bráhmins*, having invoked the manes of deceased ancestors, let him present to the *Bráhmin* occupying the foremost seat, the couch, &c., belonging to the deceased." *Deva Yugnika*, cited in the *Nirnaya Sindhu*. "Having sprinkled them with odoriferous perfumes, let him present to the sacrificer

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* Priests who attend at funerals: in some districts they are called *Mahá-bráhmin*; in others *Mahá-pátra*, *Agraháin*, *Pretiya*, *Cantaha*, *&c.* See note to page 61, Vol. II, Colebrooke's translation Digest Hindú Law.

his father's wearing apparel, his ornaments, his sleeping couch," &c. *Vrihaspati,* cited in the *Nirnaya Sindhu.*

Sudder Dewanny Adawlut, May 14th, 1823.

Nundram and others, v. Kashee Pandey and others.—Macn. H. L. Vol. II, Chap. VIII, Case xvii.

Responsa prudentum.

MADRAS S. D. A.

A Hindû, being in possession of landed and other property, died, leaving two sons, the younger a minor of thirteen years only, at the death of his father. The elder of the two, taking possession of the paternal property, proceeded to borrow successive sums of money, amounting, on a settlement of accounts with the lender, to a sum for which he gave his note, mortgaging, for the payment of it, the family property. The amount exceeds his share of that property. The younger brother was not privy at the time to the contracting of the debt; nor has he ever recognised its validity, so far as his interest is concerned. Neither does it appear that it was incurred on account of the family. Under these circumstances, is it chargeable, beyond the share of the elder brother, on the paternal property?

Answer.

The Sastree, Vencatasa, certified that, under the circumstances stated, the act of the elder brother could not prejudice the rights of the younger.

Remarks.

(Extract of a letter (1813) from Mr. Colebrooke, to the then Chief Justice of Madras, upon a suit before the Court, impeaching the transaction above alluded to; and upon which the preceding reference was made to the Pundits of the Sudder Dewanny Adawlut.)

On the subject of the question which you had lately before you, I entirely agree with you, that a mortgage, sale, or gift, by one of several joint owners, without the consent of the rest, is invalid for others' shares. In Bengal law, it is clear, that it is good for his own

share; and for that only. In other provinces, it is as clear, that the act is invalid, as it concerns others' shares; and the only doubt, which the subtlety of Hindú reasoning might raise, would be, whether it be maintainable even for his own share, of undivided property. On the two first points, then, as stated by you, the law is undoubtedly as you have viewed it. On the third point, I take the law to be, that the consent of the sharers, express or implied, is indispensable to a valid alienation of joint property, beyond the share of the actual alienor; and that an unauthorized alienation by one of the sharers is invalid, beyond the alienor's share, as against the *alienee*. But consent is implied, and may be presumed in many cases, and, under a variety of circumstances, especially where the management of the joint property, entrusted to the part-owner, who disposes of it, implies a power of disposal; or, where he was the only ostensible, or avowed owner; and, generally, when the acts, or even the silence of the other sharers, have given him a credit, and the alienee had not notice. I cannot refer you to authority beyond the passages to which you have already adverted, for this position. I rather consider it to be a point of evidence, what shall suffice to raise the presumption of consent, or acquiescence, than a matter on which the Hindú law has pronounced specifically; and I do not recollect any passages more express, than those to which you have referred, shewing that the alienation is invalid, as against the alienee. The case of Pran-nath, *v.* Cali-shunker,* to which you refer, was, I conceive, determined on the ground of implied consent; the land being answerable for the revenue, for which the managing owner had engaged, on the part of himself and sharers; besides other peculiar circumstances in the case.—Stra. H. L, Vol. II. (Second Ed.) pp. 343—345.

ZILLA OF CHINGLEPUT.—*June* 18, 1805.

Upon an application to the Court on the part of Vizayaragavienjar, son of Vurdienjar, for a division of family property belonging in co-parcenary to himself and uncles, it appears that the

* Reports in Sudder D. Adawlut, Bengal, previously to 1805, pp. 49—51.

complainant, having taken upon himself to dispose of a village belonging to the peoperty in question, has appropriated the proceeds partly in the discharge of his father's debts, the remainder to other purposes foreign to the co-heirs.

Answer.

Upon this statement, Vizayaragavienjar had no right to dispose of any part of the joint property, to answer either the debt of his father, or any purpose of his own, without the consent of his co-parceners, no partition having been previously made.

(Signed) Kistnama Chariar, *Pundit.*

Remarks.

See Mit. on Inh. Ch. I, Sect. i, § 30, 32. None can dispose of joint property (especially immovables) without consent of the sharers. But here the sale appears to have been without authority, general or speeial. In setting it aside on this ground, equity would require redress to be afforded to the purchaser, by enforcing a partition of the whole, or a sufficient portion of it, so as to make amends to the purchaser out of the vendor's share. It is presumed that the debt, stated to have been discharged, was one for which the co-heirs were no way answerable; else the case would come within the exception in the Mitákshará, Ch. I, Sect. i, § 28. C.

"Had no right," &c. Certainly not. And the sale is valid, only so far as the seller's share in the property extended. Both the seller and purchaser are punishable criminally in this case; for the sale is fraudulent in one; and, subject to the contrary being shewn, the law will imply that it is collusive in the other. See the title of *Aswámi-vikraya*, sale without ownership, in any of the books. E.

Stra. H. L. Vol. II, (Second Ed.) p. 349.

Extract of a Letter from Henry Colebrooke, Esq., to Sir Thomas Strange, dated Calcutta, Dec. 13, 1812.

In respect to a Hindú's will, I have according to my promise, examined the *Smriti Chandricá*, with the view of furnishing any

further information it might contain on the doctrines of Hindú law, which can be brought to bear on the case in question.

I find much difficulty, adverting to the positions maintained in that work, to admit any power in a joint owner to give away his proper share, yet unseparated, of the common property, whether by will, or by gift in his life-time, without the consent of his undivided brethren. The author of the *Smriti Chandricá*, speaking of common property, of which a gift is forbidden by the law, observes, that this regards common ways, and other things common to many; but property belonging to an undivided family (he says) may, in certain circumstances, be given away, since the consent of all parties concerned may be easily had in this instance, though not so, in the case of a public way, common to great numbers. It is afterwards observed, that an owner may give away his own acquisitions, without the consent of his undivided brethren, but not so joint hereditary property. The author, however, goes still further in regard to *immovables;* restricting a *sole owner* from selling, pledging, or giving away, without consent of kindred, *immovable property acquired by himself, unless* it exceed the necessary subsistence of the family, or unless the wants of the family, or other distress, require it to be parted with.

This last restriction naturally suggests the doubt, whether the prohibition in this, or in the former case, is to be taken as invalidating the act of an owner, who shall persist in disposing of his property against the injunctions of the law. But no hint of such a distinction (which is to be found in the writings of the Bengal school, between gifts valid, though forbidden, and gifts either void or voidable) is contained in the *Smriti Chandricá.* The author, on the contrary maintains, that forbidden donations shall be set aside by the sovereign authority; and it seems more consonant to his doctrine to say, that the owner's disposal of his share of undivided hereditary property, without assent of partners, is *voidable.*

I intended to have completed a similar examination of the *Mádhavya,* with reference to the same point; but the book is not just now at hand.

Stra. H. L. Vol. II, (Second Ed.,) p. 439.

Extract of a letter from Henry Colebrooke, Esq., to Sir Thomas Strange, dated Calcutta, Dec. 26, 1812.

I have examined the *Mádhavya* since I wrote to you; and find nearly the same opinions as in the *Smriti-chandricá,* more concisely expressed; but with a restriction of some importance. *Mádhavya* observes, in regard to movables, that property, which a man himself acquired, may be aliened by him, withthout the assent of his brethren, with whom he has no partition of wealth; but not so in regard to immovables; adding then the remark, that property inherited from ancestors may be given away by the chief brother, with the assent of the rest. He appears to consider all the passages cited by him in this place, as relating to immovable property; and it may, therefore, be questioned, whether he contemplated any restraint on a joint proprietor from giving away movables, not exceeding his own share of undivided wealth.

The subject is certainly one of considerable difficulty; and I have all along felt much at a loss to give a decided opinion on the question of a Hindú's will, under the law, as it prevails in your part of India.*—Stra. H. L. Vol. II, (Second Ed.,) p. 441.

Part of Mr. Colebrooke's opinion contained in Strange's Hindú Law Vol. II, (Second Ed.) p. 433.

It may be objected to *Vijnyáneshwara* and *Smriti-chandriká,* that the texts, which prohibit gifts of any portion of joint property, or of the whole of a man's sole property, thereby distressing his family, equally forbid sale and mortgage of it: so that these also would be void, although a valuable consideration have been paid or received. Injury and injustice may, however, be prevented, by holding him and his property answerable for the repayment of the money or valuable consideration received by him: and equity perhaps would award partition, for the purpose of enforcing payment from his share, thus rendered a separate one. But, in the case of gratuitous alienation, there are not the same difficulties: and I apprehend, that, under the Hindú Law, as received among those with whom the Mitákshará and *Smriti-chandriká* are the chief authortities, it must be held that the disposal by will (considered as gift) of an undivided share

* See the Chapter on Wills.

of joint property, is not valid; nor of any part of it, unless for pious purposes, or other uses incumbent on the testator to provide for, and falling within the exception which the law makes to the general prohibition.*

BOMBAY.—*January* 23, 1811.

Two brothers, possessing a house jointly, the elder executes a contract for the sale of it, in the name of himself, and his absent brother; and deposits it with a third person, on condition that it is to be delivered to the purchaser, on its being signed by the younger brother, and the purchase-money received. The younger brother objecting to sign, the purchaser still insists upon the benefit of the contract, as entered into by the elder, and sues accordingly. Is he entitled to it?

Answer.

It depends upon the age of the younger brother at the time. If he was of age, the claim is available only as against the share of the elder, who took upon himself to enter into the contract without the privity of his brother. But if the younger were at the time a minor, the property being undivided, the purchaser may enforce his claim to the full extent.

(Singed) Vistnu Pandoorung, *Sastree.*

Remark.

This opinion seems to be grounded on the Mitákshará on Inh. Chap. I, Sec. i, § 29; but should be restricted, as it there is, to a case of indispensible necessity for the common interest. The purchaser must take care, that the purpose of the sale be such as will maintain its validity under the provisions of the law.—Stra. H. L. Vol. II, (Second Ed.) p. 348.

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* See the Chapter on Wills.

BOOK II.

PRECEDENTS OF SUCCESSION OF HEIRS, &c.

CHAPTER I.

OF SONS, GRANDSONS AND GREAT-GRANDSONS,
(IN THE MALE LINE.)

CALCUTTA, S. D. A.—*The 7th of September,* 1802.

Present:

H. Colebrooke, and J. H. Harington, Esqs., *Judges.*

DULJEET SING, Appellant,
versus
SHEO-MUNOOK SING, Respondent.

The proprietor of a talook in Benares died, leaving three sons. The first son died leaving a son, the plaintiff; afterwards the second son died. Plaintiff, the grandson, sues defendant, the third son, for a partition and his share; and there are surviving, besides the parties, two widows of the second son. Adjudged, that the plaintiff and defendant take half and half by inheritance; and that the widows receive maintenance.

But it afterwards appears that the parties had withheld from the knowledge of the Sudder Dewanny Adawlut a decree of the Provincial Court (passed during the appeal to the Sudder Dewanny Adawlut) adjudging to the widows a third of the talook, under a deed executed by their husband. Ordered, therefore, that the parties get each half of the remaining two-thirds.

The respondent fined 100 rupees by the Sudder Dewanny Adawlut for mis-stating facts to the Court with respect to the said decree of the Provincial Court, with a view to obtain an order for the enforcement of the decree of the Sudder Dwanny Adawlut, which the Provincial Court had delayed until further instructions.

In September 1797, or *Bhadon* of the *Fusslee* year 1204, Sheo-munook Singh sued Duljeet Sing in the City Court of Benares, for a moiety of the zemindaree right of the talook Jughnee, in pergunnah Keswar, of which talook the annual *jummah* was stated at 12,730 rupees.

The plaintiff demanded a partition of the talook, and claimed a moiety on the ground that he was entitled by inheritance to an

equal share, with the defendant, of the talook formerly belonging to Ramrooj. The defendant pleaded, first, that neither the plaintiff nor his father had ever possessed any share of the talook, and that the plaintiff could not now be admitted to claim a share; second, that the plaintiff had resigned any claim he might eventually have had. The defendant accordingly produced an instrument termed *Baz-námah*, or deed of renunciation, under date the 4th of *Koar*, 1197, not signed by the plaintiff, but alleged to be in his hand-writing, setting forth, that he was confined by the Rajah of Benares, for a balance of revenue due on account of Pergunnah Koond, and was released on the defendant's paying the money for him, to the Rajah; in consideration of which the plaintiff relinquished all claim to a share, or division, of the talook in question.

The City Judge consulted his pundit on the case, who gave an opinion, that, from the alleged deed of renunciation, it was sufficiently clear that the zemindaree had not been divided in the time of the plaintiff's father, that is, that it was an undivided property (which appears to have been the fact); that, the zemindaree having belonged to the grandfather; and one of the plaintiff's uncles, besides his father, being dead; the zemindaree must now belong half to the plaintiff and half to the defendant. According to this opinion, the City Judge gave a decree for the plaintiff, for the moiety claimed; and, in appeal to the Provincial Court, it was affirmed; the judgment providing, that nothing in it should be considered to bar any right which the widows might possess.

A further appeal was brought to the Sudder Dewanny Adawlut (present H. Colebrooke and J. H. Harington) by the defendant, insisting, first, that the deed of renunciation was valid: second, that, nothing against the right of the widows having been decided by the other Courts, the plaintiff, at any rate, could not obtain so much as a moiety. To this the respondent objected, that the widows would by law only receive maintenance. The Sudder Dewanny Adawlut, setting aside the first plea, put the case thus to their pundits, as to the question of inheritance. Baboo Ram-rooj, zemindar of the talook, died leaving three sons, Bhoop-naraen, Prem-naraen, and Duljeet. After his death, Bhoop-naraen managed the talook on the part of the three sons: and died leaving a son, Sheo-munook. After this Prem-naraen managed the talook; and died

without issue, leaving two widows, Bukht-konwur and Binut-konwur. After this Duljeet managed the talook. Sheo-munook sues for partition, and for a share of his hereditary estate. By the Hindû law, as established in the province of Benares, what share, falls to Sheo-munook; and are the widows of Prem-naraen entitled to any share or not? The pundits declared in answer, that the 'widows were entitled to no share, but had a right to maintenance from the estate; that, the estate being divided, Sheo-munook and Duljeet would each take half.' The Sudder Dewanny Adawlut affirmed the decrees of the lower Courts; and issued the usual directions for carrying the judgment into effect. But on the 25th of February 1808, a petition was presented to the Court on the part of Sheo-munook Sing, setting forth, that, while the cause between him and Duljeet was pending in appeal before them, Duljeet (the original defendant in that cause) having learnt that the widows of Prem-naraen would only be entitled to maintenance, had, with a view to defraud the petitioner, induced them to bring an action against himself, in the Benares City Court, for a third of the talook; in which action judgment had gone in favour of the plaintiff, on the defendant's admission of their title; which judgment the Provincial Court had affirmed in appeal: that the Provincial Court therefore did not execute the decree passed by the Sudder Dewanny Adawlut in the petitioner's favour, adjudging to him a moiety of the talook; which decree the petitioner prayed might be enforced.

The Sudder Dewanny Adawlut having no information of the suit mentioned by the petitioner, called on the Provincial Court to transmit the decrees, if any such had been passed. And it appeared from the return made, that on the third of May 1799, the widows of Prem-naraen had sued Duljeet and Sheo-munook in the Benares City Court, for a third share of the talook, under a deed of gift to them from their husband, and two written acknowledgments by Duljeet and Sheo-munook: that in September following, they obtained a judgment for the share claimed; which judgment the Provincial Court affirmed in appeal, in May 1800, reciting in their decree, that the documents of the plaintiff were proved, and that Sheo-munook, in the pleadings in appeal, admitted them. And the facts represented to the Sudder Dewanny Adawlut by Sheo-munook in his petition, turned out to have been wilfully misstated. The

pleader of Sheo-munook, who presented the petition on his part to the Court, stated, in answer to questions put to him, that it was transmitted to him by an agent on the part of his client; that he could not answer for its contents; and that, while the appeal was pending before this Court, he was not informed of the suit relative to the third share.

The Sudder Dewanny Adawlut directed that Sheo-munook, for the false statement, made with a view to mislead the Court, should pay a fine to Government of 100 rupees.

And it appearing to the Court that the decrees in the suit brought by the widows against the present parties, of which suit, during the appeal, they concealed all knowledge from this Court, could not be affected by the decision passed in this Court; it was directed, that the Provincial Court, maintaining their own decree in favour of the widows for a third share, should, under the decree of this Court of September 1802, reserve to the appellant and respondent two-thirds only of the talook, giving the respondent possession of half of that portion.*—Sel. S. D. A. Rep. Vol. I, p. 59. (New Ed. p. 79.)

BOMBAY, S. D. A.—*The 27th of May*, 1824.

Present:

Romer, Sutherland and Ironside, *Judges.*

MUSSUMMAT MUNCHA and others,

versus

BRIJ-BHOOKUN and another.

In this case,—

Two sons of a Hindú, deceased, by his second wife (who survived him), were held to be entitled to share equally with the sons of a former wife in their father's property. The widow to be maintained by all the sons.—Bom. Sel. Rep. p. 1. *Vide* Moreley's Digest, Vol. I, p. 306.

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* By the rules of inheritance the widows of the second brother were entitled to a maintenance only, not a share of the estate. (Mitákshará on Inheritance, Ch. ii. Section 1, § 39.) But under a deed of gift from their husband, and written acknowledgments from both the co-heirs they acquired a right thus specially conferred on them.—Note by Sir William Macnaghten.

BOMBAY, S. D. A.—*The 3rd of July*, 1818.

Present:

Elphinstone, Keate and Sutherland, *Judges.*

LAROO *versus* MANIK-CHUND SHAMJEE.

The substance of the decision of this case is as follows:—

Where a *Hindú* claimed to obtain from his step-mother, a half of his late father's estate, leaving the other half to her son, his younger brother, it was held that the sons were each entitled to one moiety, after deduction of one twentieth share of the whole for their sister's dower, and a suitable sum for the brother's marriage.—Borradaile's Reports, Vol. I, page 418. *Vide* Morley's Digest, Vol. I, page 305.

PRIVY COUNCIL.

The 27th, 28th, 30th of Nov., and 8th of Dec., 1857.

Present:

The Right Hon. The Lord Justice Knight Bruce, the Right Hon.

T. Pemberton Leigh, the Right Hon. Sir Edward Ryan,

and the Right Hon. The Lord Justice Turner.

CHUOTURYA RUN-MURDUN SYN, Appellant, and

SAHIB PURHLAD SYN, Respondent.

An illegitimate son of a *Khattri*, one of the three regenerate castes, by a *Soodra* woman, cannot, by the Hindú law of inheritance, succeed to the inheritance of his putative father; but he is entitled to maintenance out of his deceased father's estate.

So held in the case of a disputed succession to the *Rajdom* and *Zemindary* of Ramnugur, in the Presidency of *Bengal*, of the Rajah last seized, the putative father, being a *Rajpoot* of the *Khattri* class.

Secus. In the case of the *Soodra* class, illegitimate children being qualified to inherit.

Inquiry into the History of the *Khattri* class. Such class held not to have lost caste and sunk into the *Shoodra* class.

The *Rajpoots* of Central India, and in the district where the Rajdom of Ramnugur is situate, held to be of the *Khattri* class, and that the right of succession to the *Raj* and *Zemindary* was to be determined by the laws and customs of that class.

The Right Honorable Sir Edward Ryan :—

In June, 1832, Rajah Tej Purtab Syn died, in undisputed possession of the *Raj* and *Zemindary* of Ramnugur, in the Zillah of Sarun, the right to which *Raj* and *Zemindary* is the subject-matter of the appeal. He left surviving him three widows, and an only brother of the half-blood, Rajah Umur Purtab Syn. A dispute arose between Telotma Debee, his eldest surviving widow, and his brother, as to who should succeed to the Rajdom and Estates; but this was ultimately compromised, and Telotma Debee relinquished her claim in consideration of a certain revenue secured to her for her life. Rajah Umur Purtab Syn continued in possession of the *Raj* and estates until his death, which took place in November, 1834. Upon his death, Lutchmee Debee, his widow, obtained possession of the property, and a *Virasut-namah* was filed in her name on the 5th of December following, stating that she was in possession, and claiming for her the *Raj* and *Zemindary*, as sole heir to the deceased. After the usual proclamations, the Government Collector entered her name in the books of Record as the heir and sole proprietor of the *Raj* and *Zemindary*. Subsequently, claims were set up to the property by Telotma Debee; by Oodey Purtab Syn; and by the Appellant; and also by the Respondent.

Two suits were commenced; only in August, 1835, by Oodey Purtab Syn, against the widows of Rajah Tej Purtab Syn, and Lutchmee Debee, the widow of Rajah Umur Purtab Syn, in which he claimed as heir from a common ancestor of the deceased Rajah and himself—one Mookund Syn. The Plaint in this suit is not set out in the transcript, and is not clear whether the Appellant was originally a party, or became so by a supplementary petition; but in the plaint he is stated to be the son of a slave-girl.

The other suit was commenced on the 5th of May, 1836, by the Respondent on behalf of his son, Futteh Bahadoor Syn, an infant, against the widows of Rajah Tej Purtab Syn, Lutchmee Debee, and Oodey Purtab Syn; and by an order of the Court, dated the 26th of March, 1838, the appellant was also made a defendant. This suit was founded on an *Ijazut-puttur* alleged to have been executed by Rajah Umur Purtab Syn, empowering Lutchmee Debee and his brother's widows, to bestow the *guddee* of the *Rajdom* on the Respondent's son.

These suits came on for hearing together before the Principal Sudder Ameen at Sarun, on the 7th of May, 1839, and were dismissed with costs. The grounds in which the first suit was dismissed are stated in these words, "that although Chuoturya Run Murdun Syn was the son of Umur Purtab Syn, yet whether he, not being born of a woman of equal caste, was entitled to the Rajdom during the life of Ranee Umur Raj-lutchmee Debee, was a question, the investigation of which did not become necessary in this case, because there existed no dispute or disagreement between Ranee Umur Raj-lutchmee Debee and Run Murdun Syn: but, whether Run Murdun Syn was entitled to the Rajdom, or not, while Umur Raj-lutchmee Debee lived; plaintiff had no right to the Rajdom whatever on the score of relationship, the *Zemindary* being a separate one altogether." In the suit of the respondent it was held that, as the claim rested solely on the *Ijazut-puttur* which was found not to be a genuine instrument, it was not necessary to go into the matter of relationship.

From these decisions, Oodey Purtab Syn and the present Respondent, on behalf of his infant son, appealed to the Sudder Dewanny Adawlut, on the 12th of July 1840. After the Appeal, and before any further proceedings, Ranee Umur Raj-lutchmee Debee died; upon which the present appellant and the Respondent, as father and guardian of Futteh Bahadoor, presented to the Sudder Court separate petitions, in which they set forth their respective claims to be considered as heirs to the deceased Ranee. Mr. Reid, the Judge, before whom these petitions came, directed the Principal Sudder Ameen of the Zillah of Sarun to receive proof of their claims as heirs to the deceased. In the meantime, the estate was attached by the Collector under order of the Judge and placed under a Manager, and a proclamation issued for the attendance of heirs. Oodey Purtab Syn, the respondent, in his character of father and guardian; the surviving widow of Rajah Tej Purtab Syn; and the Appellant, attended to prove their respective claims. On the 7th of November, 1840, the papers relating to proof of succession were brought before Mr. Reid, and in an order made by him of that date, he states that as from the decision of the 7th of May, 1839, it appears that Run Murdun Syn is the son of Rajah Umur Purtab Syn, but by a woman of unequal rank, it has, therefore, become

imperative on him, before going into the merits of the case, to require a *Bywasta* (law opinion) from the Pundit of the Court, on the point, whether among Hindûs a son by a woman of unequal rank, while lineal relations are forthcoming, will be entitled to inherit the estate of his deceased father; and the Pundit is accordingly ordered to give his opinion on the point. In January, 1841, the *Bywasta* of the Pundit is filed: it states, "that among Hindûs of the Rajpoot caste, a son who is not born from a woman of equal rank and caste can be reckoned as son, and will be entitled to the estate of his deceased father, a near relative of lineal descent living notwithstanding, because a Rajpoot is of the *Soodra* caste, and a son born to an individual of a *Soodra* caste, even from the womb of a slave, &c., is reckoned his son by the *Shaster* laws, and is entitled to succeed to his father's estate, a near relation of lineal descent living notwithstanding;" and he also states that "if there be no legitimate offspring, that is to say, no issue from a married woman, in such a case, the illegitimate son of an unmarried *Soodra* woman will be entitled to the whole of his father's estate."

This *Bywasta* was brought before Mr. Reid on the 5th of February following, and he then proceeded with the further hearing of the cause, and he was of opinion that, although this *Bywasta* of the Pundit was in favour of Run Murdun Syn, yet that considering the claims of the parties, it was inexpedient to dispose of the case without going into its full merits, and he ordered that both cases should be tried together, and that all the objecting parties and claimants should be at liberty to come forward, and that the name of the party whose claim should be found good, should be entered in lieu of the name of the deceased widow.

On the 23rd of May, 1842, the proceedings taken before Mr. Reid, and all the other papers in these suits, were, by an order of the Court, brought before a Full Bench, and the Judges, consisting of Mr. Leo Warner and Mr. James Shaw, recorded their opinion in these terms: "We perfectly agree in the opinion pronounced by the Principal Sudder Ameen in regard to the validity of the *Ijazutputtur*. But as inquiry into the agnatic descent of the Appellants in the both cases, and the objections made by Chuoturya Run Murdun Syn, and his marriage in a Rajpoot family, has been neglected by the Principal Sudder Ameen, we return the decisions of

the Principal Sudder Ameen, dated 7th of May, 1839, as incomplete; and, under Cl. 2, Sec. 2, of Reg. IX of 1831, hereby order that the papers of this case and of case No. 50, of 1840, with a copy of this proceeding, be sent back to the Principal Sudder Ameen of Sarun, accompanied with a precept with this order: that he restore both the cases to their former number; and, as regards this case, he should inquire whether the marriage of Chuoturya Run Murdun Syn, who declares himself to be the son of Umur Purtab Syn, and whose marriage, by the papers appears to have taken place in the village of Bel Ghat, in Zillah Ghoruckhpoor, and in the family of a Hindû *Sahee* of the Rajpoot caste, had actually taken place in a Rajpoot family, and whether he eats and drinks with them or not; and whether the marriage of Rajah Umur Purtab Syn with Lutchmee Dya Debee, the mother of Chuoturya Run Murdun Syn, was solemnized according to the custom and practice of the family or not; and after requiring and obtaining from Sahib Purhulad Syn, father and guardian of Futteh Bahadoor Syn, the Plaintiff in case No. 50 of 1840, a petition in regard to his agnatic descent, and a genealogical table and documentary proofs and witnesses from both parties, to try and decide the two cases as may be most consistent with justice and equity, as regards the heirship of Run Murdun Syn to the estate of his father, Rajah Umur Purtab Syn, and the relationship of the parties according to the genealogical tables given in by both."

In November, 1842, the Respondent filed a supplementary petition, setting forth his genealogy, and claiming in his own right as the next male heir of Rajah Umur Purtab Syn.

In February, 1845, the Principal Sudder Ameen gave judgment on the retrial of these causes, and held the Respondent to be the nearest next of kin to the deceased Rajah Umur Purtab Syn; that Oodey Purtab Syn being only remotely related, had not established his claim; that the marriage of Rajah Umur Purtab Syn with Lutchmee Dya Debee was not proved; that the Appellant, as the illegitimate son of Rajah Umur Purtab Syn, was entitled to maintenance.

Against this decision, Chuoturya Run Murdun Syn, in April 1845, appealed; and on the 9th of April, 1846, the Sudder Dewanny Court dismissed the appeal, affirming the decree of the Zillah Court

in all respects, except as to the allowance of maintenance to Chuoturya Run Murdun Syn; which part of the decree was reversed.

From the decree of the Sudder Dewanny Court the present appeal comes before their Lordships, and the Appellant objects to the decree.

First. Because, he claims to be entitled to the Raj and Zemindary, as the legitimate son of the late Rajah Umur Purtab Syn.

Secondly. Because, if the alleged marriage and legitimacy be not established, he claims to be entitled to the inheritance as the illegitimate son of the Rajah.

Thirdly. That if not entitled to the inheritance, he is, as the illegitimate son, entitled to maintenance out of the estate, which the Court has disallowed.

In 1838, the Appellant endeavoured to establish by evidence, on the first question, that the late Rajah Umur Purtab Syn was married, according to the custom of the family, to Lutchmee Dya Debee, and the Respondent endeavoured, by evidence, to show that the Appellant was the illegitimate son of a slave-girl. Upon the retrial of these cases before the Principal Sudder Ameen in 1845, no fresh witnesses were called by the appellant to establish the marriage, although special directions were given as to the issues on this point; but many witnesses were called by the Respondent to show that no such marriage took place. Their Lordships, therefore, are of opinion, that no satisfactory grounds have been alleged for disturbing the finding of the Court below on this matter of fact, confirmed by the judgment of the Sudder Dewanny Court, and are of opinion, that the Appellant has failed to establish the alleged marriage of his father with Lutchmee Dya Debee, and that consequently his claim as the legitimate son of the late Rajah cannot be sustained.

Then arises the second question, whether the Appellant is entitled to the inheritance as the illegitimate son of the late Rajah?

There is no dispute as to the paternity of the Appellant, and the principal matter for inquiry is the Hindú law of inheritance, with regard to the right of succession of illegitimate children.

This law, it appears, varies according to the different classes of the Hindús, and it is necessary, therefore, in the first instance, to consider what those classes are, and where they are to be found. It

is undoubted that there were originally four classes: First, the *Brahmins;* second, the *Khattris;* third, the *Vaisyas;* fourth, the *Soodras:* the first three were the regenerate or twice born classes, the latter the servile class. It was contended on the part of the Appellant, that the *Khattri* and *Vaisya* classes have ceased to exist, and were sunk into the *Soodra* class, and that there are now two classes only, namely, the *Brahmin* and the *Soodra.* The appellant, in order to show that the proper genuine "*Khattri*" are extinct, cites as authorities in support of this position, "the *Ayeen Akbery,* or, the Institutes of the Emperor Akber," Vol. II, page 377, in which there is this passage: "At present there are scarcely any true *Khattris* to be found, excepting a few who do not follow the profession of arms."—"Those among them, who are soldiers, are called *Rajpoots.*" Tod's "Annals and Antiquities of *Rajasthan,*" Vol. I, p. 53, where it is said, "Of the fifth dynasty of eight princes" "four were of pure blood, when *Kistra,* by a *Soodra* woman, succeeded." Ward's "Account of the Hindús" Vol. I, p. 66 (Edit. 1815). Sec. 2, which treats of the *Kshattriya* caste, has this passage:—"Some affirm, that there are now no *Kshatryas* in the *Kali Yuga,* that only two castes exist, *Brahmins* and *Soodras,* and that the second and third orders have sunk in the fourth."

Steele, "Summary of the Law and Customs of Hindú castes," p. 95, says, "The *Brahmins* assert that Purus-ram destroyed the whole of the *Kshattriyas;*" and at p. 96: "The Rajpoots, Mahratta chiefs of the Sattara or Bhonsle, and *Kolapoor* families, &c., and other houses, lay claim to the title of *Kshattriya,* and wear the *Jenwa.* But they are considered *Soodras* by the *Brahmins;*" and there is an opinion to the like effect expressed by Mr. Sterling, in a paper on Orissa proper, in Vol. V, of the "Asiatic Researches," p. 195: "The proper genuine *Khattris* are, I believe, considered to be extinct, and those who represent them are, by the learned, held only to be *Soodras.*"

Whatever weight may be due to these authorities in support of a speculative opinion, entertained, perhaps, by learned *Brahmins* and others, their Lordships have, nevertheless, no doubt that the existence of the *Khattri* class as one of the regenerate tribes, is fully recognized throughout India, and also that Rajpoots in central

India, and in this District, are considered to be of that class. No doubt, as far as we are aware, has ever been raised in the Courts in India as to the existence of the *Khattri* class as one of the regenerate tribes. The Courts in all cases assume that the four great classes remain. Thus Sir W. Macnaghten, in his marginal note to Pershad Singh *v.* Ranee Muhesree (3. S. D. Rep. 132), says, "according to the Hindú Law, an illegitimate son of a Rajpoot or any of the three superior tribes, by a woman of the *Soodra* or other inferior class, is entitled to maintenance only." In the statement of the case, he takes it as an admitted fact that a Rajpoot is one of the three superior tribes; although it is true, as has been observed, that the point ultimately decided in this case, was only that the paternity was not established. In the second volume of Macnaghten's "Principles of Hindú Law," p. 119, the marginal note is, 'The illegitimate son of a person belonging to one of the regenerate tribes (in this case a Rajpoot) is entitled to maintenance only." Accurate information as to the distinction of classes, especially in this part of India, is to be found in the statistical survey of Dr. Francis Buchanan, conducted under the direction of the Government of India. The second volume of M. Martin's "India" contains Dr. Buchanan's report on the District of Goruckpoor, and at p. 456 he says, "The Rajpoots are here, everywhere and by all ranks, admitted to be *Khattris* although they claim all manner of descents, except from the persons who, according to the *Vedas,* sprung from the arms of *Brahma.*" Other passages in the same report have been referred to by Mr. Leith to the same effect. The Rajpoots are mentioned in Elphinstone's "History of India" Vol. I, p. 607, as the military class in the original Hindú system; so also in Cunningham's "History of the Sikhs," p. 202. Thornton, in his "Gazetteer," Tit., "Rajpootana" says, "The widely spread sect of Rajpoots are considered offsets of the *Kshattriyas,* one of the four great castes into which the Hindús were originally divided." Sir John Malcolm, in his "Memoir of Central India," Vol. II, p. 125, enters fully into the state and condition of the Rajpoot tribes. They are treated of throughout his history as belonging to the Superior class; he mentions that although their intercourse with females of a lower tribe may have, in some instances, produced a mixed race; yet even in this class, which he terms the bastard Rajpoot tribes, the lowest of

them who aspire to Rajpoot descent, consider themselves far above the *Soodras*.

In the report of Dr. Buchanan, mention is made of the existence of this mixed race in the District of Goruckpoor, and that there are several persons of the mountain tribè, called *Khattris*; who are a spurious race, but who claim all the dignities of the military order. One of the witnesses in this case, the Rajah of Gopalpoor, a *Khattri Kossuck*, states that his family do not intermarry with the mountain Rajahs. It seems to us, therefore, not only that the *Khattri* class must be considered as subsisting, but that according to the Hindú Law generally prevailing in this part of India, and independently of exceptions arising out of any well-established usage or custom to the contrary, as to particular places or families, Rajpoots are to be considered as of the *Khattri* class.

From these premises it seems to us to follow, that (it being indisputable that Rajah Umur Purtab Syn was a Rajpoot) the true question to be decided in this case as to the Hindú Law of inheritance is—not whether the illegitimate son of a *Soodra* man by a *Soodra* woman can inherit, but—whether the illegitimate son of a *Khettri* can in any event inherit, whether his mother be a *Soodra*, or of any other caste.

The law relating to the right of succession of illegitimate children, is thus stated in the first volume of Sir. W. Macnaghten's "Hindú Law," p. 18:—"Among the sons of the *Soodra* tribe, an illegitimate son by a slave-girl takes with his legitimate brothers a half share; and where there are no sons (including son's sons and grandsons), but only the son of a daughter, he is considered as a co-heir, and takes an equal share." In the second volume of the same work, in a foot-note, p. 15, he states: "According to the Hindú law, the illegitimate son of a *Soodra* man by a female slave, or a female slave of his slave, may inherit, but not the illegitimate child of any of the three superior classes;" and he adds, "If the woman were not his female slave, the son begotten on her by him would have no right to the inheritance, but only a claim to maintenance." As an authority in support of the passage in his text, Sir W. Macnaghten refers to Colebrooke's translation of the Mitákshará, on Inheritance, which, as is well known, is the standard authority on this subject in all the schools of Hindú law, from Benares to the

Southern extremity of the Peninsula of India. In chapter I, Section 12, of that work on "The right of a son by a female slave, in the case of a *Soodra's* estate," it is thus stated: "The author next delivers a special rule concerning the partition of a *Soodra's* goods. 'Even a son begotten by a *Soodra* on a female slave, may take a share by the father's choice. But if the father be dead, the brethren should make him partaker of the moiety of a share; and one who has no brothers, may inherit the whole property, in default of a daughter's sons. In clause 3, it is stated, that the rule does not apply to the three superior regenerate classes. From the mention of [a *Soodra* in this place it follows that] the son begotten by a man of a regenerate tribe on a female slave, does not obtain a share even by the father's choice, nor the whole estate after his demise. But if he be docile, he receives a simple maintenance.

In another treatise on the Hindú law of inheritance, also translated by Colebrooke, and which is the great authority in Bengal. The "*Dáya-bhagá* of *Jímúta-váhana*," p. 151, the same doctrine is to be found. Also in the treatise on "Adoption," translated by Mr. Sutherland. The *Dattaka Mimánsá* Sec. 2, cl. 26. p. 32, and the *Dattaka Chandriká* Sec. V. cl. 30. p. 205, the third Volume of *Colebrooke's* Dig. cl. XXIV. p. 143, Strange's 'Hindú Law,' pp. 69—132 of Vol. I, and p. 68 of Vol. II.

A decision on the right, among *Soodras*, of illegitimate children to inherit, is reported in Sir Thomas Strange's Notes of Cases at Madras, Vencata Ram v. Vencata Lutchmee Ummall (Vol. II. p. 305). In his judgment he says, illegitimate children of *Soodras* inherit, but in the case of illegitimate children begotten by a regenerate man, the law is different; they are entitled to maintenance only.

It seems, therefore, to be established by an unusual concurrence of authority, that according to the law prevalent where this property is situated, the illegitimate son of one of the three regenerate or twice-born races cannot succeed to the inheritance of his father. We think, therefore, that the Appellant's case fails on the second point no less than on the first.

The only remaining question is the reversal by the Sudder Dewanny Court of that part of the judgment of the Zillah Court which directed that an annual sum of Rs. 6000 should be set aside out

of the estate, given by the decree to the Respondent, for the maintenance of the Appellant. The grounds upon which the Sudder Dewanny Court reversed this part of the judgment do not appear in these proceedings. The right of an illegitimate child of one of the three regenerate classes to maintenance out of the estate of his father, is recognized by all the authorities on Hindú Law relating to this subject; and as to this, there was no difference of opinion between the Pundit of the Sudder and the Pundit of the Zillah Court, although they differed on the right to the inheritance. It is not shewn that the allowance is in excess of what the Appellant is justly entitled to receive with reference to the value of the estate; and on this question, the native Judge of the Court of the District in which the Zemindary is situated had the best means of forming a correct opinion. If the Court had thought the amount in excess, means might have been taken to ascertain what would be a proper allowance. In this part, therefore, of the decree of the Sudder Dewanny Court, their Lordships are unable to concur: they are of opinion that although the Appellant is shown to have no right to the inheritance, either as the legitimate or the illegitimate son, he is still entitled to maintenance out of the estate of his deceased father.

Their Lordships, therefore, will humbly recommend to Her Majesty to reverse the decision of the Sudder Dewanny Court, in so far as it reversed the decision of the Sudder Ameen, with respect to the maintenance, to declare that the Appellant, as the illegitimate son of the late Rajah Umur Purtab Syn, was, and is, entitled to maintenance out of his estate, at the rate fixed by the Sudder Ameen, and to remit the case to India for the purpose of effect being given to that declaration, but in other respects to dismiss this appeal, although without costs, the appeal having, in part, succeeded.—Moore's Indian Appeals, Vol. VII, pages 18 to 53.

According to Hindú law prevalent in Madras, legitimate children of illegitimate parents of the *Soodra* caste, can contract a legal and valid marriage.

According to Hindú law, illegitimate children of the *Soodra* caste can inherit, and are entitled to maintenance.

The marriage between persons of different sections of the *Soodra* caste is valid and legal.—*Inderan Valungypuly Taver* v. *Ramaswamy Pandia Tulaver* and another.—Privy Council. B. L. R. Vol. VIII, p. 1.

Madras, H. C. A.*—*January 3rd*, 1865.

Muttu-samy Jaga-vira Yettapa Naikar, Appellant,

versus

Venkata-subha Yettia, Respondent,

The illegitimate son of a *Soodra* by a concubine, not being a female slave, is entitled to maintenance according to Hindu Law.

Judgment.—This is a special appeal from a decree of the Civil Judge of Tinnevelly awarding Rupees 8,400 per annum to the plaintiff below, found to be the son of the late zemindar by a concubine.

The question really is whether this son, not being the child of a female slave, is entitled to maintenance.

In his first volume at page 18, the learned author (Macnaghten) states the doctrine and quotes in its support the Mitákshará, Chap. I, Sec. xii, which declares the circumstances in which the son of a *Soodra* by a female slave is to inherit. The word "female slave" is used throughout the passage, but the not very delicate discussion in Colebrooke's Digest (Vol. II. 221, &c.) of the circumstances and employment which, according to some commentators, distinguish slavery from mere servitude, seems to show that no peculiar weight ought to be attached to the word "slave." Again, if the Sanscrit word in the Mitákshará is दासी, as we were informed at the bar that it is, a reference to any dictionary will show that the word means "a female of the *Soodra* tribe, the wife of a fisherman and a concubine." Even if it were दास as the masculine noun means equally "a fisherman" and "a servant," there seems no reason for supposing that the feminine does not mean a female ser-

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* Present: Frere and Holloway J. J.

vant, although "female slave is the only meaning given to it by Wilson in his dictionary. Without a careful collation of the original it would be difficult to determine this point. If the restriction is really laid down by the authorities, it is probably on account of the difficulty of tracing sonship where the woman is not absolutely under the reputed father's power.

The son imperfectly adopted was held to be in the condition of a slave, yet a person so imperfectly affiliated would unquestionably be entitled to maintenance. Assuming him to be excluded from the inheritance, it seems impossible to say that he would not be entitled to maintenance. We find from *Murdun Singh* v. *Purhulad Singh* (VII Moo. I. A. 18)* that the illegitimate son, even of a man of the regenerate tribe, is entitled to maintenance. It cannot be disputed, as indeed it is in that case as throughout all the authorities admitted, that the illegitimate son of a *Soodra* stands in this particular in a better condition than one of a twice-born man.

The right to maintenance, too, follows upon the exclusion from inheritance, and we are unable to see that there would be any justice in upholding the argument used at the bar that he may have been entitled to inherit, but, as he has lost the inheritance, he has no right to be maintained. For the purpose of the present case it is sufficient to say that the plaintiff is within the precise words of the rule laid down by Macnaghten. Whether reason and legal analogies will not show that the rule is too much narrowed is open to question. As to the amount of maintenance, nothing has been urged to justify us in disturbing the decision of the Lower Court, or to show that in this case the amount of maintenance is a question of law at all. This special appeal is dismissed with costs. *Appeal dismissed.*—Mad. H. C. R. Vol. II, p. 293.

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* *Ante*, page 199.

MADRAS H. C. A.*—*The 15th of February*, 1868.

N. KRISHNAMMA, Special Appellant,

versus

N. PAPA and 2 others, Special Respondents.

The words "the heirs of the preceding Kurnum" in Section 7 of Regulation XXIX of 1802 mean his next of kin according to the order of succession of several grades of legal heirs and not heirs in the order of succession to undivided divisible ancestral property.

A daughter's son is one of the nearer sapindas, and in the line of heirs before a brother's son according to Hindú Law.

Semble, an illegitimate son of a *Soodra* by his concubine is his heir in preference to a brother's son.

This was a special appeal against the decision of P. Srini-vasa Rao, the Principal Sudder Ameen of Vizagapatam, in Regular Appeals Nos. 102 and 117 of 1867, reversing the decree of the Court of the District Munsiff of Vizagapatam in Original Suit No. 18 of 1864.

Judgment:—This is a suit to establish the right claimed by the plaintiff to an hereditary office of Kurnum, and to recover the lands forming the *mirasi maniem* attached thereto. The 2nd defendant is the present holder of the office, having been appointed by the 3rd defendant under Regulation XXIX of 1802. But the Lower Appellate Court has dismissed the suit without going into the question whether the lands are appurtenant to the office, on the ground that the 2nd defendant, the illegitimate son of Ramanna by the 1st defendant, his concubine, was his heir, and entitled to the office in preference to the plaintiff, Ramanna being a *Soodra*.

From that decision the 1st plaintiff has appealed, and the objection relied upon on his behalf is that the Hindú Law in regard to the rights of an illegitimate son of a *Soodra* to inherit is strictly limited to a son by a woman in one of the conditions of slavery defined by the law. This position has been met on the part of the respondents with the argument not only that the law has a general application to all illegitimate sons of *Soodras*, but that assuming the law to be so limited, and the 2nd defendant not eligible, the

* Present: Scotland, C. J. and Innes, J.

legitimate grandson of Ramanna through his daughter is a nearer heir than his nephew, the appellant, and of right therefore entitled preferably to the office under the Regulation, and we are of opinion that this contention is well founded and fatal to the claim in the suit.

We think that the words "the heirs of the preceding kurnum" in Section 7 of Regulation XXIX of 1802, mean his next of kin according to the order of succession of the several grades of legal heirs, and not, as has been argued on behalf of the appellant, heirs in the order of succession to .undivided divisible ancestral property. Now a daughter's son is clearly one of the nearer sapindas and in the line of heirs before a brother's son, and consequently if the appellant's objection is valid, the 2nd defendant is the person whom the Section makes it obligatory on the 3rd defendant to appoint, except he be incapacitated for the duties of the office, and that must be established by proof before the Judge of the Zillah, which it is not pretended has been done. The plaintiff therefore has failed to show a right as heir rendering his appointment to the office obligatory on the 3rd defendant.

It becomes unnecessary to express a decision on the appellant's objection to the 2nd defendant's right to succeed, but we may observe that our present apprehension of the authorities leads us to think that the Lower Appellate Court has taken the sound view of the law.

The decree appealed from must be affirmed, and the appellant must pay the costs of the 1st and 2nd respondents.—Mad. H. C. Rep. Vol. IV, pp. 234—241.

The illegitimate son of one of the mixed classes between the second and third of the regenerate classes has no title to inherit by the ordinary rules of Hindú Law, and the circumstance that the father was illegitimate does not alter the law.—*Srí Gaja-paty Hari Krishna Devi Gáru,* Appellant v. *Srí Gaja-paty Rádhika Patta Mahá Devi Gáru,* Respondent.—Mad. H. C. Rep. Vol. II, p. 369.

MADRAS, H. C. A.—*The 4th of January,* 1869.

Present:

Collett, and Ellis, *Judges.*

DATTI PARISI NAYUDU and 3 others, Special Appellants,

versus

DATTI BANGARU NAYUDU and 3 others, Special Respondents.

The illegitimate son of a *Soodra* being the offspring of an incestuous intercourse (intercourse between a father-in-law and his daughter-in-law) is not entitled to inherit or share in the family property according to Hindú Law.

Semble.—**To entitle the illegitimate sons of a *Soodra* by a *Soodra* woman to inherit a share in the family property, the intercourse between the parents must have been a continuous one, and the woman must have been an unmarried woman. Therefore the illegitimate son of a *Soodra* by a *Soodra* woman living with him in adultery is not entitled to a share in, or to inherit, the family property.**

The plaint was filed by the 4th plaintiff as the mother and guardian of the 1st, 2nd, and 3rd plaintiffs who were minors to recover a half share in the property situated in the village of Vangaru. The plaint stated that the 1st, 2nd, and 3rd plaintiffs are step-brothers of the 1st and 2nd defendants, and the 3rd defendant is their step-sister, and the 4th defendant is father of the 1st, 2nd, and 3rd plaintiffs, and 1st, 2nd, and 3rd defendants.

The 1st defendant in his statement states that the property in dispute and some other property of much value are in possession of the 3rd and 4th defendants, and he has no property whatever in his own possession; that it is true that a document was executed to the 4th defendant for settling the division of the common property, but it was not divided according to the said document; that therefore he should be compelled to divide and give up his share, and that his costs ought to be ordered to be paid by the plaintiffs.

In the statement put in on behalf of the 2nd and 3rd defendants, it was alleged that the fourth plaintiff was first married to the 1st, 2nd, and 3rd defendants' deceased elder brother Ramu Naidu, by whom he begot two daughters; and on her husband's death, she lived in the defendants' house for two years; but having by secret illicit intercourse conceived the 1st plaintiff, she was turned

out by all the defendants; that afterwards she continued to carry on her adulterous course publicly; that the 4th defendant kept the 4th plaintiff contrary to Hindú law even when the 1st plaintiff was 3 years old.

The 4th defendant supported the case made by the plaintiff.

The plaintiffs and 4th defendant stated at the first hearing of the suit that though the 4th plaintiff was the widow of the 4th defendant's eldest son, yet the 4th defendant married her according to the custom prevailing in their family. The 2nd and 3rd defendants contended that it was not their usage to marry a daughter-in-law.

The sole question for our consideration is that on which the Principal Sudder Ameen has decided against the 3rd plaintiff, viz., whether the illegitimate son of a *Soodra* being the offspring of an incestuous intercourse is entitled to share in the family property. All references to the English or Mahomedan law, or to the supposed law of nature, are irrelevant, as they cannot assist to a decision of this case which must be entirely governed by the Hindú law. Nor can we allow ourselves to be influenced by any consideration of the increasing importance of the caste of *Soodras* in the present day. After the decision of this Court reported in II. Madras High Court Reports 293 (*ante* 210,) we think it quite unnecessary to review the numerous texts cited by the Principal Sudder Ameen (to which we could readily add others) wherein the word "*Dási*" is used. We are governed by that case and are well satisfied to be so. There is the authority of both Hindú and English writers on Hindú Law to show, and indeed it was conceded in argument before us, that the illegitimate son of a *Soodra* by "an unmarried *Soodra* woman" is entitled to share in the family property. It is also quite necessary for us to review the texts cited by the Principal Sudder Ameen with reference to marriages between Hindús who are *Sa-gotra*. In the first place, the use of the term *Sa-gotra* shews that those texts refer only to the three regenerate castes, and in the next place, there is no question in the present case that there could have been no legal marriage between the parties and that their intercourse was simply incestuous.

We should also probably be prepared to agree with the Principal Sudder Ameen that to entitle the illegitimate sons of a *Soodra* by a *Soodra* woman to participate, the intercourse between the

parents must have been a continuous one; there must have been an established concubinage, or in other words, the woman must have been one, "exclusively kept" by the man. But it is unnecessary for us to decide that point, for upon the facts as found in this case we take it to be clear that the intercourse between the 4th plaintiff and 4th defendant was a continuous and exclusive concubinage.

When the matter for consideration is thus reduced to its proper dimensions, the question left for decision is the short one we have stated above. It is admitted that there is no express authority to be found upon the point. We are of course not at all inclined to extend the legal recognition of concubinage among *Soodras* beyond what the terms of the law require, and we think that the phrase "other unmarried *Soodra* woman" used by the authors alluded to above may rightly be applied strictly and establishes that the illegitimate son of a *Soodra* by a *Soodra* woman living with him in adultery would be excluded from participating in the family property. Then we think that there is authority for holding that the son of a *Soodra* by a woman of one of the regenerate or superior castes would similarly be excluded from participating in the inheritance of his natural father, and for this we think it sufficient to refer to *Dáyabhága*, Chap. V, Art. 14, *Smriti Chandriká* (Kristna Swamy Iyer's Translation) pp. 63, 64, Arts. 11 and 14, and the texts cited and the comments thereon to be found in 3 *Colebrooke's Digest* pp. 129, 143, 325, 326. The fair result we think of these express authorities is to indicate the principle that though the law recognizes concubinage among *Soodras* and admits the illegitimate sons of the concubine to participate in the estate of the father along with the legitimate sons by his wife, yet that the illegitimate sons will be excluded from this privilege where the intercourse between their parents was one in violation of, or forbidden by, the law, and clearly an incestuous intercourse is of this nature. Upon this ground we think that we are justified in concurring in the judgment of the Principal Sudder Ameen that though in point of fact the 3rd plaintiff in this suit is the illegitimate son of the 4th defendant by the 4th plaintiff, yet as intercourse between a father-in-law and his daughter-in-law is clearly forbidden and incestuous, the 3rd plaintiff is not entitled to participate with the other defendants, the legitimate sons of the 4th defendant, in the family property.

We therefore confirm the decrees below and dismiss this special appeal with costs.—Madras High Court Reports, Vol. IV, p. 204.

Among *Soodras*, illegitimate children inherit to their putative fathers.—*Venkata-ram* v. *Vencata Lutchemee Ullam* and another.—Stra. H. L. Vol. II, p. 304.—Morl. Dig. Vol. I, p. 310.

But illegitimate sons of Rajpoots, or any of the three superior tribes, by a woman of the *Soodra* or other inferior class, are not entitled to inherit.—*Pershad Singh* v. *Ranee Muheshree.*—S. D. A. Rep. Vol. III, p. 132 (New Ed.) p. 176. Morl. Dig. Vol. I, p. 310.

And the same point was decided in *Cawareeboyee* v. *Sree Ram Doss.*—Case 5 of 1826. Mad. S. D. Dec. Vol. I, p. 546.—Morl. Dig. Vol. I, p. 311.

A son not born in lawful wedlock may inherit if such be the custom of the province, but not otherwise. In this case, it appearing that, by the custom of the Nagur Brahmans in Benares, illegitimate sons cannot inherit, judgment was passed against the claimant, the illegitimate son of a Nagur Brahman suing for his father's estate.—*Mohun Sing* v. *Chumun Rai.* 20th November 1799.—S. D. A. Rep. Vol. I, p. 68. (New Ed.) p. 37.

CALCUTTA, H. C. A.—*The 14th of December*, 1864.

Present:

The Honorable C. Steer and E. Jackson, *Puisne Judges.*

Regular Appeal from an order passed by the Principal Sudder Ameen of Patna, dated the 29th of March, 1864.

LUCHOMUN PERSHAD (Defendant,) Appellant,

versus

DEBEE PERSHAD (Plaintiff,) Respondent.

Under the Mitákshará law, a grandson (his father being dead) shares equally with a son the self-acquired property* of the grandfather.

This is a suit in right of inheritance to a moiety of the estate, real and personal, of the late Deen-dyal Bhugut. The plaintiff is

* Also the ancestral property.—See *ante*, page 195. See also Partition.

the grandson of the late Deen-dyal, and the defendant is the son of Deen-dyal.

The first issue arising out of the pleadings, is one of law, *viz.*, whether by the Mitákshará law, a grandson, whose father dies before his father, can succeed to the self-acquired property of the grandfather where his son is alive. The second issue is one of law and fact combined, *viz.*, whether Banee Ram, the son of Deen-dyal, and the father of the plaintiff, was expelled from the paternal abode and lived separate from his father, and whether these facts extinguished Banee Ram's right of inheritance to his father's estate, and the inheritance, in consequence, of his son.

It is admitted, that the property of which Deen-dyal died possessed was all self-acquired property.

It has been held by the Principal Sudder Ameen that, under the Mitákshará law, a grandson inherits in an equal degree with a son, and on the issue of fact he is of opinion that there is no truth whatever in the allegation of the defendant that the plaintiff's father Banee Ram was expelled by his father from the paternal abode, and on these findings he decrees to the plaintiff a moiety of the estate of his grandfather.

It is at once admitted on the part of his pleaders that, by the Hindú law as current in Bengal, a grandson whose father is dead, takes equally with a son of the grandfather's self-acquired property. But it is contended that the Bengal school and the Mitákshará school differ materially in regard to the rights of such grandsons, and that with respect to them they have no right of inheritance while a son exists, who, as conferring higher benefits to his deceased ancestors, has a prior and superior right to the inheritance, and that the law books are also clear that a son is an obstruction to the grandson in the way of his inheritance.

We think that there is no warrant for this contention from the authorities which have been cited in support of it.

No doctrine of Mitákshará law is better established than this that the right of a son as a joint owner with his father accrues to him from the moment of his birth, and that though a father may alienate his personal estate, the son's right to it, if it is not alienated, is as clear and undoubted as his right is to the ancestral estate. If then this is the true principle of law, Banee, the son of Deen-dyal,

possessed undoubtedly a joint interest with his father, and had he lived, he would, with his brother, have shared half and half the patrimonial estate.

The word "*puttro*" in the Hindú law books has been construed to mean not only a son, but a son's son and male issue to the fourth generation. Therefore there is no force in the argument, that the defendant being the son of Deen-dyal confers more benefits on his departed ancestors than the plaintiff who is only Deen-dyal's grandson, for both being sons in the interpretation of Hindú law, both confer equal benefits, and both being in the sense of sons, the one is not an obstruction to the other.

On the issue of fact, we are altogether with the Court below in considering the plea of Banee's expulsion and separation from his father, a mere pretext adopted for the purpose of defeating the rights of the plaintiff in this suit.

In this view of the case, we affirm the judgment of the Court below, and dismiss the appeal with costs.—S. W. R. Vol. I, page 317.

Grandsons of the original acquirer of certain property instituted an action, during the life of the latter, against their paternal uncle, for their shares of the estate acquired by their common ancestor. Held, that they were entitled to their shares, on proof that the original acquirer had relinquished his title to the property in favor of his sons, and that therefore no legal objection existed to the division of the estate between the sons or their representatives.—*Byram Singh* and another v. *Seeb-suhae Singh* and others.—S. D. A. Rep. Vol. VI, page 65.

A Hindú dying possessed of real property, and leaving a son and grandson, an equal right descends to each, and not to the son alone.—*Duyá-shunkur Kassee-ram* v. *Brij-vullubh Mootee-chund.* Bom. Sel. Rep. p. 41.—Morley's Digest, Vol. I, page 307.

Admitted and Approved legal opinions.

The son of a *Soodra* by a female slave will inherit if there be no other heirs down to daughter's son.

Q. The eldest brother of a *Soodra* family, which consisted of four brothers and a sister, had one son by a female slave; and the sister, during the husband's absence, and while he was residing in a foreign country, had a son by a stranger. The other three brothers died, leaving no heir. Now there are two persons, namely, the son of the eldest brother, and the son of the sister, living, and each claims the property. In this case, on which of these survivors will the property left by the brothers devolve?

R. Under the circumstances above stated, in default of all heirs down to the daughter's son, the family being of the *Soodra* tribe, the entire property will devolve on the son begotten by the elder brother on a female slave.

The son of the sister has no title to the inheritance.

The text of *Yájnyavalkya* cited in the Mitákshará:—"Even a son begotten by a *Soodra* on a female slave, may take a share by the father's choice. But, if the father be dead, the brethren should make him partaker of the moiety of a share: and one who has no brothers may inherit the whole property, in default of a daughter's son."*

Bukhtear Singh, *versus* Bahadoor Singh and others.

Zillah Hooghly, March 3rd, 1816.—Macn. H. L. Vol. II, Chap. I, case 11.

* According to the Hindú law, the illegitimate son of a *Soodra* man by a female slave, or a female slave of his slave, may inherit, but not the illegitimate child of any of the three superior classes. It appears in this case that the parties are *Soodras*; but it is not distinctly stated whether the eldest brother died previously or subsequently to the death of any or all of his other three brothers, or whether the woman on whom the plaintiff was begotten by him was one of the fifteen descriptions of slaves, or was merely a concubine. If the woman were his slave, and the other three brothers died before the eldest, then the son begotten by him on the female slave would be entitled to the entire property. On the other hand, if one or more of the brothers died subsequently to the death of the eldest brother, the illegitimate son would be entitled to claim only such portion as belonged to his putative father, there being no law admitting the son of a *Soodra* by a female slave to share the estate of collaterals. If the woman were not his female slave, the son begotten on her by him would have no right to the inheritance, but only a claim to maintenance; and under no circumstances could the son of the sister begotten as above have any right to succeed to his mother's brothers.

The illegitimate son of a person belonging to one of the regenerate tribes is entitled to maintenance only.

Q. A *Rajpoot* died, leaving a widow and a concubine of the *Aheer* tribe, by whom he had four sons; and on his death, his widow performed all the exequial ceremonies necessary on the occasion. In this case, are the sons and their mother entitled to any proportion of the property left by the deceased owner; and if so, to what portion is each of the survivors entitled?

R. Under the circumstances stated, the entire property left by the deceased, excepting such ornaments and clothes as were worn by the concubine and her sons, will devolve on the widow. The concubine and her sons have no right to share such property, but they are entitled to maintenance. This opinion is conformable to *Menu, the Mitákshará, Vivâda-ratnâkara, Vivâda-chintámani,* and other authorities.

Authorities.

The text of *Vrihaspati,* cited in the *Vivâda-ratnâkara* and other authorities: "The virtuous and obedient son born of a *Soodra* woman unto a man who leaves no *legitimate* offspring, shall take a *provision for his* maintenance, and the kinsmen shall inherit the remainder of the estate."

"This relates to the son of a woman not lawfully married." The *Vivâda-ratnâkara* and *Vivâda-chintâmani.*

"Even a son begotton by a *Soodra* on a female slave, may take a share by the father's choice." "From the mention of a *Soodra* in this place, it follows that the son begotten by a man of a regenerate tribe on a female slave, does not obtain a share even by the father's choice, nor the whole estate after his demise. But, if he be docile, he receives a simple maintenance."—Mitákshará.

Gotama:—"A son by a *Soodra* woman, born unto a man who leaves no *legitimate* offspring, shall, if he be strictly obedient like a pupil, receive a provision for his maintenance."

"The son begotten on a *Soodra* woman not lawfully married, by a man belonging to one of the three first classes, who leaves no son by a woman of twice-born class, shall receive a provision for his maintenance, that is, some trifle, as a stock whereon he may earn a livelihood by agriculture or the like.—The *Vivâda-ratnâkara.*

Zillah Bhaugulpore, July 17th, 1824.—Macn. H. L. Vol. II, Chap. VII, Case xii.

A son's son shares equally with sons.

Q. A person had four sons, one of whom died before him, leaving a son; and shortly after his son's death, the original proprietor died. There are now surviving his three sons and a grandson. In this case, is the grandson entitled to inherit from his grandfather.

R. The son's son will equally share with his paternal uncles, though his father died before his grandfather.

Authorities.

To this effect *Yájnyavalkya* says: "The ownership of father and son is the same in land which was acquired by his father, or in a corody, or in chattels."

Kátyáyana thus declares: "Should a son die before partition, his share shall be allotted to his son, provided he had received no fortune from his grandfather, that son's son shall receive his father's share from his uncle, or from his uncle's son: and the same *proportionate* share shall be allotted to all the brothers, according to law."

According to the above authorities, if a son die previously to partition, his son is entitled to his father's portion.

Zillah Bareilly, January 19th, 1821.—Macn. H. L. Vol. II, Chap. I, Case vi.

Sons' sons whose fathers are missing, inherit equally with sons.

Q. A person died leaving seven sons, four of whom, after a lapse of time, were missing, and the remaining three took possession of the paternal estate, confiding the management of it to one of their number. In this case, will the property of the deceased devolve on his three sons and the missing sons' sons?

R. The deceased proprietor's grandsons, whose fathers are missing, are entitled to share the property with his sons according to their fathers' shares. From the circumstance of the management being confided to one of them, the right of the others cannot be divested. This opinion is conformable to law.

Authorities.

When the father is dead," &c. (*Dáya-bhága*, page 9).

"Among the issue of different fathers, the allotment of shares is according to the fathers."

"And the dissipation of their hereditary maintenance is censured."

Zillah Shahabad, June 20th, 1804.—Macn. H. L. Vol. II, Chap. I, Case vii.

Grandsons in the male line whose father is dead, and great-grandsons whose father and grandfather are dead, share with sons, and inherit *per stirpes*, not *per capita*.

Q. A landed proprietor had two sons. Of these, one died, leaving four sons, of whom two are living, and the other two dead, leaving their sons. In this case, to what proportion of the lands is each entitled?

R. Supposing the person in question to have died, leaving some landed property, and two sons, and, of the two sons, one to have died, leaving four sons, of whom two have since died, and the other two are living, then the property left by the original proprietor should be made into two shares, of which one will devolve on his son, and the remaining one will be subdivided into four parts, of which two will go to the two surviving grandsons, and the other two portions to the heirs of the two deceased grandsons. If, of the deceased grandsons, one had many sons, and the other had less in number, they will, in that case, take their fathers' respective shares, and divide them, according to the numbers of the brothers among themselves. This opinion is conformable to the *Dáya-bhága*, *Dáya-krama-sangraha*, and *Mitákshará*.

Authorities.—"Among the issue of different fathers, the allotment of shares is according to the fathers."

"If unseparated brothers die, leaving male issue, and the number of sons be unequal, one having two sons, another, three; and a third, four; the two receive a single share in right of their father, the other three take one share appertaining to their father; the remaining four similarly obtain one share due to their father,

So, if some of the sons be living, and some have died leaving male issue, the same method should be observed; the surviving sons take their own allotments, and the sons of their deceased brothers receive the shares of their own fathers respectively. Such is the adjustment prescribed by the text."—Mitákshará.

Calcutta Court of Appeal.—Macn. H. L. Vol. II, Chap. I, Case viii.

Responsa prudentum.

ZILLA OF DARAPOORAM.—*February* 3, 1807.

COOPATRA-VADOO, *v.* SUNJALATRA-VADOO.

The plaintiff is the legitimate son of one Condatatra-vadoo. The defendant is his son by a woman whom he kept. The father being dead, what becomes of his property?

Answer.—It is his son's by his lawful wife, to the exclusion of the defendant, subject to any gift that may have been made by the deceased in his life-time; and this not in fraud of the rights of the plaintiff, as his legitimate son.

(Signed) S. Sunkara, *Sastree.*

Remarks.

See Mitaksh. on Inh. Ch. I, Sect. xii;—and Dig. Vol. III, page 223. C.

The son is interested in his father's property, nor can any incident of birth deprive him of this inherent right.

With respect to *Soodras*, (all the tribes of which are, in law, nearly equal,) I am inclined to think that sons, of whatever description, are entitled to equal shares. E.

In this case, I think the legitimate son is the sole heir to his deceased father's estate: nor do I believe the Hindú law, in any case, except in the instance of a *Soodra's* son by a female slave, recognises the heritable right of illegitimate children. The first in the serie sof heirs is male issue (*Puttra*). But whom does the law include in this term? To this I should reply, 1. The real legitimate

son. 2. Next, son of the son, or of the son's son. 3. The *Putra-pratinidhi*, or substitute son. Again, of the *Putra-pratinidhi*, by the ancient law, eleven descriptions are recognized; and of these the *Paunarbhava*, or son of the twice-married woman alone might, in some instances, be regarded as "a natural son," in one acceptation of the term. But, in the present age, of the eleven subsidiary sons, the adopted son of the two descriptions technically called *Dattaka*, or the son given, and *Kritrima*, or the son made, is alone approved by the law and general practice. What constitutes a legal adoption, is a question involving many considerations, and which will not be here relevant. S.

Stra. H. L. Vol. II, (2nd Ed.) p. 65.

MADRAS SUDDER ADAWLUT.

Q. Has an illegitimate son any, and what, hereditary right?

A. His father may settle a share upon him, if he make partition in his life (1). On the death of the father, without partition, he takes with his legitimate brothers, a half share (2). If none, he is entitled to a share equal to that of a grandson, by a daughter.

Remarks.

(1) See Mit. on Inh. ch. I, sect. xii, § 1 and 2.

(2) Provided the father do not belong to one of the three higher tribes, for this rule is restricted to the *Soodra*. 3 Dig. 143.

Stra. H. L. Vol. II, (2nd Ed.) p. 70.

MADRAS SUDDER ADAWLUT.

Has the son of a Brahmin, begotten on a *Soodra* woman, any, and what, claim on the estate of his father?

Answer.—To the extent of food and raiment.

Remarks.

Provided he be of good conduct, and, as expressed in the Mitákshará, (Ch. I, Sect. xii. 3,) *docile*. C.

The Court would presume the natural son qualified to receive maintenance, unless the opposite party could shew what, in the contemplation of the law, is a legal disqualification. S.

Stra. H. L. Vol. II, (Second Ed.) p. 71.

ZILLAH OF VIZAGAPATAM.—*May* 8, 1804.

A man having an illegitimate son, whom he had educated and married, had afterwards children born in wedlock; and conceiving an aversion to the former, he turned him out of his house, denying his having any claim upon him. The case being referred to the Pundit of the Court, his opinion was, that the son in question being neither *Datta* nor *Aurasa*, (neither adopted nor legitimate,) and no other being inheritable in the Cali age, he could enforce no claim on the property of his putative father; that it was nevertheless competent to the latter, if he thought proper, to admit him to a share, and this without the consent of his legitimate issue; and that, provided he was free from vice, he could not, without violating the Sastras, refuse him food and raiment.

Remarks.

Issue by a concubine is described in the law as son by a female slave, or by a *Socdra* woman. If the father were a *Soodra*, he might have allotted a share to his illegitimate son. Mit. on Inh. Ch. I, Sect. xii. And the obligation of affording him the means of subsistence is declared in passages quoted in *Jagan-natha's Digest*. Vol. III, p. 170. C.

The *Aurasa puttra* (literally, son of the breast) is described as the son begotten by a man on his lawfully wedded wife. Is a *Gándharva* marriage legal, or illegal? If legal, the offspring of such a marriage would be legitimate; and, no doubt, the right of succession would arise. S.

Stra. H. L. Vol. II, (2nd Ed.) p. 68.

CHAPTER II.

WIDOW'S SUCCESSION, &c.

CALCUTTA SUDDER DEWANNY ADAWLUT.

Present:

H. Colebrooke and J. Fombelle, *Judges.*

NUND KOOWUR, Appellant,

versus

TOOTEE SINGH AND UHLAD SINGH, Respondents.

By the Hindú Law, as current in the West, a widow does not inherit the property of her husband, when held in co-parcenary, but only when held in severalty. In the former case, she is only entitled to maintenance out of it.

After the death of Ujeet Singh, Jhuboo Koowur succeeded to his share, and after Kehur Singh's death, Kurum Koowur took possession of his share of the estate of their father, Kishen Singh. On the demise of the latter, Nund Koowur sued for the whole estate, as the widow of the only male descendant of Kishen Singh. Uhlad Singh and Tootee Singh claimed the respective shares of their maternal grandfathers, Ujeet Singh, and Kehur Singh, as their heirs at law. On the 13th of March 1813, Mr. H. Colebrooke put the following questions to the Pundits of the Sudder Dewanny Adwalut:—

Q. 1. "If Kehur Singh and Ujeet Singh had held, in co-parcenary, the estate which they inherited from their father, Kishen Singh, to whom would it go after the death of their widows; whether to the wife of a son who died before them, to a surviving daughter, to the sons of their deceased daughters, or to their *Swagotra*?"

Q. 2. "If they had held the estate in severalty, and not in co-parcenary, who would inherit?"

Answer to question 1. If the estate had been held by the brothers jointly, then, on the death of Ujeet Singh, his interest would have devolved on his brother, Kehur Singh, and not on his widow, Jhuboo Koowur. On this supposition, then, Kishen Singh's estate

would have come entire to Kehur Singh; and after his death, and the demise of his widow, his daughter, Gyan Koowur, would be entitled to the whole, to the exclusion of all other claimants. Nund Koowur the son's childless widow, is only entitled to maintenance out of the estate.

Authorities.

The text of *Nareda*, quoted in the *Mitákshará, Víra-mitrodya, Vyavahára Mádhava, Vyavahára Mayúkha, Viváda Tántava*, and others. "Among brothers, if any one die without issue, or enter a religious order, let the rest of the brethren divide his wealth, except the wife's separate property."*

Mitákshará.—"If the husband die, either unseparated from his co-parceners, or re-united with them, his widow has no right to the succession."†

The text of *Náreda*, and others, quoted in the *Vír-mitrodaya*. "If sons have lived unseparated, or have re-united, the childless widow of one of them, though chaste, is entitled only to her maintenance."

The text of *Vrihaspati*, quoted in the *Mitákshará, Vír-mitrodaya, Viváda Tántava*, and other treatises. "As a son, so does the daughter of a man proceed from his several limbs. How then should any other person take the father's wealth?‡

Answer to question 2. If Ujeet Singh and Kehur Singh held the estate in severalty, the share of the former will go, on his death, to his widow, Jhuboo Koowur, and after her death to Soogbee§ Singh and Uhlad Singh equally.

On the demise of Kehur Singh, and of his widow, their daughter, Gyan Koowur, will inherit the whole of his share, and Nund Koowur will only be entitled to maintenance out of that share.

Authority.

The text of *Yájnyavalkya*, quoted in the Mitákshará &c. "The wife, and the daughters also, &c., are heirs in succession to the estate of one who departed for heaven, leaving no male issue."||

* Vide Colebrooke's Mitákshará, Ch. II, Sec. I, para 7, p. 326.
† Ibid, Ch. II, Sec. I, para 19, p. 331. ‡ Ibid, Ch. II, Sec. 2, para 2, p. 341.
§ Sic in orig. || Vide Colebrooke's Mitákshará, Ch. II, Sec. I, para 2, p. 324.

Mitákshará, and other treatises.—"When a man, who was separated from his co-heirs and not re-united with them, dies leaving no male issue, his widow, [if chaste,] takes the estate in the first instance."*

The Court (present H. Colebrooke and J. Fombelle) were of opinion, that the uncontested possession which Jhuboo Koowur had held of the estate of her deceased husband for many years, was proof of the property having been separated; and therfore passed a decree, agreeably with the *Vyavasthá*, awarding Ujeet Singh's share to his heirs, Sooghee Singh and Uhlad Singh, and Kehur Singh's portion to his daughter, Gyan Koowur.—S. D. A. Rep. Vol. IV, p. 330. (New Ed.) p. 420.†

By the laws as current in the West, a widow succeeds to the inheritance of her husband, living separate from his ancestral family, in default of sons, grandsons and great-grandsons.—*Raj Koomar Bissessur Koomar Singh* v. *Mussummat Sookh Nundun Kooer.*—S. D. A. Rep. Vol. VII, p. 87.

If two brothers be dis-united, and one of them die leaving a widow, but no children, the property of the deceased goes to the widow.—*Mussummat Goolab* v. *Mussummat Phool.*—Borr. Rep. Vol. I, p. 154. Morl. Dig. Vol. I, p. 318.

By the law as current in Behar, the grandson of a paternal uncle is excluded by a brother's son, and on the brother's son's death, by his widow, if the family were divided.—*Mussummat Deepoo* v. *Gowree Sunker.*—S. D. A. Rep. Vol. III, p. 310 (New Ed. p. 410).

A Hindú widow's right to succeed to her husband's ancestral undivided property is only as his immediate heir.

A Hindú widow can only inherit family property where there has been a partition among the co-parceners of whom her husband was one, or where the whole property has vested in her husband by the death of all the other co-parceners.

* Colebrooke's Mitákshará, Ch. II, Sec. i para 30, p. 335.

† This case ought to have been placed in Vol. II, of the Select Reports, but not having been so, it has been inserted, by way of Foot Note, under the case "Mussummat Gyan Koonwur v. Dook-hurn Singh and Debee Dutt" (to be found in daughter's succession of the present work), and in so doing the Reporter, Sir W. Macnaghten, says: "This case was not reported in its place. As it in some measure affects this (*i. e.*, above) suit, and is in itself remarkable, a brief abstract of it is subjoined."

A widow of an undivided Hindú who leaves a co-parcener him surviving, has, like the widow of a divided Hindú who leaves male issue, merely a right to maintenance.

Where, therefore, a widow sued for a Pálayappattu as heir to the surviving brother of her husband :—*Held*, that the suit must be dismissed.—*Peddamuttu Viramani, Appellant* v. *Appu Rau* and others, Respondents.—Mad. H. C. Rep. Vol. II, p. 117.

A Hindú widow, whether childless or not, stands next in the order of succession on failure of male issue.

Daughters can succeed only on failure of widows.

Where A had two wives, B and C, and B predeceased A, leaving three daughters, and C survived A and was childless:—*Held*, that C succeeded to A's property in preference to the three daughters.—*Perammál*, Appellant v. *Venkatammál*, Respondent.—Mad. H. C. Rep. Vol. I, p. 223.

By the law as current in *Mithilá*, where there are no sons, a widow inherits, during her life, property which belonged *solely* to her husband, but without power of alienating it.—*Mussummat Lalchee Coonwur* v. *Sheo Persad Singh* and others.—S. D. A. Rep. Vol. VII, p. 22.

A childless Hindú widow takes both the real and personal estate of her deceased husband he leaving no male issue.—*Ravee Bhudr Sheo Bhudr* v. *Roop Shunker Shunkerjee*.—Borr. Rep. Vol. II, p. 656. Morl. Dig. Vol. I, p. 312.

A Hindú dying, and leaving a widow and a daughter by a former marriage, the widow (the step-mother) inherits the estate, to the exclusion of the step-daughter; but the latter being next in succession, the step-mother cannot sell or alienate the property. *Gunga* v. *Jeevee*.—Borr. Rep. Vol. I, p. 384.

A Hindú widow is entitled to the accumulations of the income from her husband's estate. *Panna-lall Seal* v. *Srimatí Bama-sundarí Dásí*.—B. L. R. Vol. VI, p. 732.

If a son die before his father, the father's wife will succeed on his death, in preference to the son's widow; but if the father died

first, then the son's wife is heiress on her husband's death, and the mother-in-law gets only a maintenance.—*Ram-koonwur* v. *Ummur*. Borr. Rep. Vol. I, p. 415.—Morl. Dig. Vol. I, p. 315.

Ancestral property of an undivided family having descended to an adopted son, will go, on his death, to his widow, and the widow of his adoptive father has no claim to share in the estate.—*Vencata Soobummal* v. *Vencummal*.—Case 12 of 1818. Mad. Dec. Vol. I, p. 210. Morl. Dig. Vol. I, p. 315.

MUSSUMMAT JORAON KOOWUR, Appellant,

versus

CHOWDHREE DOOSHT-DOWUN SINGH, MUSSUMMAT SOORJA KOONWUR and others, Respondents.

The Judge of Zillah Tirhoot gave judgment to the following effect:—"It is clear from the plaintiff's own admission that her husband Opender Singh died before his brother Ooda Singh; there is no proof on the part of the plaintiff that the property of the two brothers Opender Singh and Ooda Singh was ever divided between them, and in the absence of such it must be presumed that no division ever took place; such being the case, Ooda Singh, according to the law as current in Mithila, which in such cases regulates the succession, succeeded to his brother on the death of the latter. On the death of Ooda Singh his widow will inherit for her life-time, and the plaintiff Joraon Koonwur is entitled only to maintenance. The deed of adjustment executed between the plaintiff and the widow of Ooda Singh, which has been pleaded by the plaintiff, is clearly illegal on both sides: on that of the plaintiff, as she was entitled only to a maintenance, and on that of Soorja Koonwur, as she held only a life-interest in the property. The plaintiff's claim must be dismissed."

On appeal to the Sudder Dewanny Adawlut, that Court (present: D. C. Smyth, Esq.) confirmed the decision of the Zillah Judge.—Sel. S. D. A. Rep. Vol. VII, p. 26 (New Ed. p. 30).

CALCUTTA H. C. A.—*The 29th of June* 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble L. S. Jackson, *Judge.*

LALLA MOHA-BEER PERSHAD and others (Defendants) Appellants,
versus
MUSSUMAT KUNDUN KOOWAR (Plaintiff) Respondent.

The *Jains* are governed by the Hindú Law of Inheritance applicable in that part of the country in which the property is situate.

An actual partition by metes and bounds is not necessary to render a division of undivided property complete.

According to Hindú Law there is a co-parcenership between the different members of a united family, and survivorship follows upon it.

The widow would take the inheritance of her husband if he at the time of his death had been separate in estate.

Peacock, C. J.—This is a suit brought by Mussumat Kundun Koowar as widow and heiress of Lalla Moneerut Doss for a declaration of right and inheritance, and for the recovery of possession of certain property according to the shares specified in an *ikrár-namah* dated the 30th of October 1857, and also of a share in Mouzah Shaha-pore, Puttee Shaha-pore.

The property is situate in a district subject to the Mitákshará Law of Inheritance, but the family are *Jains.*

It is contended by the appellants that the plaintiff, as widow of Moneerut Doss, is not entitled to succeed to his share, as at the time of his death he was joint in estate with his cousins, and that the lands were situate in a District in which the Mitákshará Law prevails.

On the other hand, it was contended,—*first,* that the family were Jains, and therefore not subject to the Mitákshará; and, *secondly,* that the plaintiff's husband was not joint in estate, and that, consequently, even, according to the Mitákshará Law, the plaintiff was entitled to succeed in her suit.

Several issues were laid down in the cause, the most important of which were the 1st, 2nd, 3rd, 4th, and 5th, which raised the two points above-mentioned.

The case was tried before the Principal Sudder Ameen, who, upon the authority of a Bywasta given in 1863 by the Pundit of the High Court in another case, held that the plaintiff was entitled to inherit her husband's share whether the property were joint or separate, and, *secondly*, that the plaintiff's husband as regards the property in question was separate. He consequently gave a decree in favor of the plaintiff. From this decree some of the defendants have appealed.

The Bywasta relied on was given by the Pundit of the late Sudder Court. The Pundit on that occasion referred to *Gautama Sanhitá*, and certain books said to be of authority among the Jains; but the books were referred to generally, and no reference was made to any particular passage.

The authority of *Gautama* is quoted in the Mitákshará, Chapter II, Section i, Verse 8, and of itself is no sufficient authority in support of the doctrine for which it is cited; for the author of the Mitákshará, after quoting the authority of *Gautama* in the Verse above cited, shows in a subsequent Verse 19, that the widow does not take when the husband is unseparated.

In verse 30 the conclusion is arrived at from the arguments in the previous Sections, and it is there said:—"Therefore the right interpretation is this: 'When a man, who was separated from his co-heirs and not re-united with them, dies leaving no male issue, his widow (if chaste) takes the estate in the first instance.'"

The learned Counsel for the plaintiff, respondent, have not been able to refer us to any authority in support of their argument that, amongst the Jains, a widow is entitled to inherit, whether the husband is separated or not.

In the absence of evidence to prove that the rules of Inheritance of the Jains are not the same as those of the orthodox Hindús, we cannot say that the Jains are not governed by the Hindú law of Inheritance applicable in that part of the country in which the property is situate, *viz.*, the *Dáya-bhága* in Lower Bengal generally, the Mitákshará in the Mitákshará Districts, and the *Maithila* in the *Mithilá* country.

If the members of a particular sect of Hindús claim to be governed by a particular law, and not by the ordinary Hindú Law applicable to the District generally, we think it is for them to prove

clearly as a matter of fact, by Pundits, or other persons acquainted with their usages, by what other rules their rights of inheritance are regulated. It was for the respondent in this case, as it was in the Shiva-gunga case, to show (if her case depended upon it) that the property did not descend according to the usual course of Hindú Law prevailing in the district. (See 9 Moore's Indian Appeals, 608).

The *Bywasta* produced in evidence was not acted upon in the case in which it was given. It is very unsatisfactory, and it is not shown that the Pundit had any peculiar knowledge of the usages of Jains in respect of Inheritance, or that they are not governed by the general law which is binding upon other Hindús. He does not state why the rules laid down in general terms by *Gautama* as to a widow's right of inheritance to be applicable to the Jains whether the husband was separate or not, notwithstanding it has been shown by verse 30, Chapter II, Section 1, of the Mitákshará that it is applicable only when the husband was separate in estate.

We are of opinion that the *Bywasta* does not contain a correct exposition of the law and that it cannot be acted upon as an authority, and that in that part of the country in which the Mitákshará prevails, the Jains, like other Hindús, are bound by that reading of the law.

We do not, therefore, concur with the Principal Sudder Ameen so far as his decision relates to the 3rd issue.

The question, then, arises whether the family was undivided or divided in estate in respect of the property which is the subject of this action.

The question has been very recently considered and decided by the Privy Council in an Appeal from Madras—Appovier v. Ramsubba Aiyan and others. The judgment was pronounced on the 17th of November 1866, though I believe the case has not yet been published in any of the regular reports.*

That case appears to be so very similar to the present, that I cannot do better than read the following extract from that judgment.

The Lords of the Judicial Committee of the Privy Council say:—

* Since published: See W. R. Vol. VIII, P. C. p. 1.

"According to the true notion of an undivided family in Hindoo Law, no individual member of that family, whilst it remains undivided, can predecate of the joint undivided property, that he, that particular member, has a definite share. No individual member of an undivided family can go to the place of the receipt of rents, and claim to take from the collector or bailiff of the rents a certain definite share. The proceeds of the undivided property must be brought, according to the theory of an undivided family, to the common chest or purse, and dealt with according to the modes of enjoyment of the members of an undivided family. But when the members of an undivided family agree among themselves with regard to particular property, that it shall thenceforth be the subject of ownership in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject matter so agreed to be dealt with; and in the estate each member has thenceforth a definite and certain share, which he may claim a right to receive and to enjoy in severalty, and although the property itself has not been actually severed and divided."

"The appellant admits that the deed was operative with regard to a certain number of villages, because, he says, those were actually divided; but he contended it was not a deed which made the family a divided family with regard to the rest of the villages, because it has not been followed by actual partition."

"It is necessary to bear in mind the twofold application of the word 'division.' There may be a division of right, and there may be a division of property; and thus, after the execution of this instrument, there was a division of right in the whole property, although, in some portions, that division of right was not intended to be followed up by an actual partition by metes and bounds, that being postponed till some future time when it would be convenient to make that partition."

"The deed, after dealing with the villages that were intended at once to be the subject of an actual partition proceeds thus:—'But inasmuch as it is not convenient to divide now our moiety of the villages,' (then follows an enumeration of the villages) 'we shall divide every year in six shares the produce of them and enjoy it, after deducting the *sarkar sist* and charges on the villages.' Nothing can express more definitely a conversion of the tenancy, and with

that conversion a change of the *status* of the family *quoad* this property. The produce is no longer to be brought to the common chest representing the income of an undivided property, but the proceeds are to be enjoyed in six distinct equal shares by the members of the family who are thenceforth to become entitled to those definite shares. Thus, using the language of the English Law merely by way of illustration, the joint tenancy is severed, and converted into a tenancy in common."

"Then, if there be a conversion of the joint tenancy of an undivided family into a tenancy in common of the members of that undivided family, the undivided family becomes a divided family with reference to the property that is the subject of that agreement, and that is a separation in interest and in right, although not immediately followed by a *de-facto* actual division of the subject-matter. This may at any time be claimed by virtue of the separate right."

"The words with which this instrument of the 22nd of March 1834 concludes manifest an intention to become divided, for after expressing that they have already divided the silver, brass, utensils, the parties use these words:—'We have henceforward no interest in each other's effects and debts except friendship between us.' We find, therefore, a clear intention to subject the whole of the property to a division of interest, although it was not immediately to be perfected by an actual partition."

"We have no doubt of the legal effect of this deed of March 1834. It operated in law a conversion of the character of the property and an alteration of the title of the family, converting it from a joint to separate ownership, and we think the conclusion of law is correct, *viz.*, that that is sufficient to make a divided family, and to make a divided possession of what was previously undivided, without the necessity of its being carried out into an actual partition of the subject-matter."

This decision is in my opinion quite consistent with justice and common sense, and, also with the law of Inheritance as laid down in the Mitákshará when carefully read and studied; but even if it were not so, it is an authority by which we are governed.

Reading the *ikrar-namah* of the 30th of October 1851, it appears clear that, although the four parties to the instrument had

been jointly carrying on the business of the *kotee* and purchasing landed properties, taking *zur-i-peshgee* and other usufructuary leases, they had been still separate in point of interest and each had been receiving one-fourth share of the profits and appropriating it to his own use. The *ikrar-namah*, it was admitted, was between Mukhum Lall, son of Chadee Lall, the two sons of Bechun, the son of Gopal-chand, and Moneerut Doss, the plaintiff's husband, the son of Showkee Lall. When I speak of the four parties to the deed, I consider the grandsons of each of the sons of Chadee Lall, the common ancestor, as taking *per stirpes* the shares of their respective fathers and as forming one party entitled to the same one-fourth share, as their respective fathers would have been, if living.

This is made clear by that part of the deed which says that it is expedient that the declarants should have the names of themselves recorded in the books of the Collector as proprietors in equal fourth shares as follows: that is to say, one-fourth share in the name of Mukhun Lall, who was the surviving son of Chadee Lall; one-fourth in the names of Lalla Moha-beer Pershad and Monohur Doss, sons of Bechun Lall; one-fourth in the name of Munnee Lall, son of Gopal-chund; and one-fourth in the name of Moneerut Doss, son of Showkee Lall.

It appears from the deed that the four sharers had previously made a settlement by which they were entitled to the lands and the profits of the *kotee* in equal fourth shares, and that the four sharers were in possession each of one-fourth share of the lands, and had contributed in those shares to the payment of the Government revenue; that the lands stood, some in the name of one, and some in the names of others of the four sharers; and that with a view of making the settlement more sure and of removing future doubts, the *ikrar-namah* was executed and four lists regarding the *kotee*, and that four schedules of houses, ancestral and acquired, had been made out, and one of them deposited with each of the parties. It is then declared solemnly by the *ikrar-namah* that, according to the terms inserted therein, the parties would cause the names of the four sharers to be inserted in the register of the Collector as proprietors of equal shares in the said mehals and of the zemindarees and mouzahs in mokurruree. It then declares that the villages held under *zur-i-peshgee* mortgages, the *putwa* villages, and other vil-

lages which might in future be held under zur-i-peshgee mortgages, certain villages held under a conditional sale, and certain other properties, as well as the capital and the debts and assets mentioned in the *chitta* of the *kotee*, should be the property of themselves, the four sharers, in equal shares, without reference to the persons in whose names the documents were made out; and that they should enjoy the profits or sustain the loss in equal shares. It is then declared that, of their mutual accord, they left the business of the *kotee* to be conjointly conducted and managed as heretofore; that the affairs of the *kotee* should be managed in the best possible manner in consultation with, and with the consent of, all the sharers; that they would share and appropriate the profits thereof according to the shares afore-mentioned, that is to say, one-fourth share each; that if in future any property should be purchased with the assets of the *kotee*, or any transaction in the shape of *peshgee, putwa,* usufructuary lease, or conditional sale, should be made with the profits of the joint *kotee* in favor of any of the co-sharers, they should all be entitled thereto each receiving a fourth share; that the houses, shops, and gardens, mentioned in the schedule, which stood in the name of all the four co-sharers, the silver plates, tents, carpets, household furniture, and conveyances, should remain in the possession of themselves, the four co-sharers, as they had hitherto been.

Nothing can be clearer to my mind than that the parties were separate in interest although an actual partition had not been effected, and that their object in executing the *ikrar-namah* was to render the settlement by which their interests had been divided more sure and to prevent future disputes. The parties were content to separate in interest; they did not require a formal partition so long as there was no disagreement between them. But, lest any disagreement should arise, the following clause was inserted in the *ikrar-namah* providing for an actual partition whenever it should become necessary. They say "God forbid! If at any time there arise between ourselves or our heirs any contention or disagreement, then we or our heirs shall, in accordance with the shares aforesaid, partition all the property entered in the *chitta* of the *kotee* and schedules, and also whatever property may hereafter be acquired with joint funds, and take equal shares, that is to say, each one-fourth. On

this point no one shall have any plea to urge, nor shall any one have anything to do with the share of another."

It is clear that the parties in this case intended that there should be a division of the interest, although there was no formal partition by metes and bounds.

They then point out certain properties which were the exclusive property of some of the sharers, and declare that in these none of the others has any right or interest.

The *ikrar-namah* contains strong evidence to show that the parties were separate before that document was executed; but even if they were not, the *ikrar-namah* effected a division of right as to the property in which the parties agreed they should be entitled to equal fourth shares.

It is unnecessary to go into the evidence to show that the *ikrar-namah* was acted upon, and that the joint receipts and profits, after deducting expenses were divided into four shares and carried to separate accounts, the evidence upon this and other points, showing that the parties were separated.

We must ascertain what the parties intended to do, and what they did, and then decide what were the legal consequences of their acts. In the Shiva-gunga case, 9 Moore's Indian Appeals, 611, it was laid down clearly that, according to the principles of Hindú Law, there is a co-parceneryship between the different members of a united family and survivorship following upon it; that there was a community of interest and unity of possession between all the members of the family; and that upon the death of any one of them, the others take by survivorship *that* in which during the deceased's life-time they had a common interest and a common possession.

In this case there was no community of interest, and it appears, to me, therefore, that the interest of the plaintiff's husband did not pass by survivorship to the other sharers, but descended to his widow, the plaintiff. I am therefore of opinion that the Principal Sudder Ameen was right in holding that the parties were separate as to the properties included in the *ikrar-namah*.

The decision of the Lower Court (which is in favor of the widow, the plaintiff) must be affirmed with costs of this appeal.

Jackson J.—"I will add only a few words to the judgment of my Lord, in which, after long and anxious deliberation on the case, I desire now to express my concurrence."

(Some of the words added by him to the above judgment are as follows:—)

"In this case I have never entertained any doubt as to the failure of any evidence to show that the Jains living in a part of the country where Hindûs are governed by the Mitákshará Law, had among themselves any rule or principle of inheritance other than that prescribed in the Mitákshará; and it, therefore, unquestionably followed that the widow, the plaintiff in this case, would only take the inheritance of her husband if he at the time of his death had been separate in estate."

Sutherland's Weekly Reporter, Vol. VIII, p. 116.

CALCUTTA S. D. A.—*The 5th of November*, 1821.

POKHNARAIN, MOHUN LALL, and SOHUN LALL, Appellants,
versus
MUSSUMMAT SEESPHOOL (Widow of Ram-dyal),
Respondent.

The decree of a Court below in favor of a Hindû widow for possession of her husband's landed property amended on the ground of its not having specified the nature of her interest, and the mode in which the property should be disposed of after her death.

This was a claim originally preferred in the Zillah Court of Tirhoot, by the Respondent, to recover possession of half the *talooks* Bhugwan-pore, Mominabad, Hurnarain-pore, &c.

On the 13th of June 1821, the whole of the proceedings of the case having been gone through before the Second Judge (C. Smith,) before whom the case was first heard in appeal, he decreed as follows:—It appears from all the evidence adduced, that Gunaish Dutt and Ram-dyal were two brothers in joint possession of an undivided landed estate situated in the district of Tirhoot; that on the death of the former individual, the latter succeeded to his portion in right of inheritance, and continued in exclusive enjoyment of the entire property until his death when both shares devolved of right

on his widow Mussummat Seesphool. This indeed is the substance of her plaint, although for the present she has advanced her claim to one moiety only, and has stated it to be her intention to lay claim to the other moiety at a future period. It appears from the second law opinion delivered by the pundits, that Mussummat Seesphool has a right to the possession of the estate left by her husband during her life-time; that she may make such disbursements as are necessary for the spiritual welfare of her deceased husband; that she is not at liberty to make any other description of alienation, and that after her death, in the event of there not being in existence any heir of her husband from his daughter down to his spiritual teacher, the property, which had so devolved on the widow, should escheat to the ruling power. But, in the decrees of the Courts below, there is no mention made of the widow's inability to alienate, nor of the mode in which the property should be disposed of after her death. It seems, therefore, necessary to amend the decree of the Provincial Court by wording the decision thus:—'Mussummat Seesphool shall have a life interest in one moiety of the landed property left by her deceased husband, which property shall be sequestered to the use of Government, in the event of there not being at the time of her death any surviving heir of her husband, from the daughter down to the spiritual preceptor. The decree should further provide that Mussummat Seesphool is at liberty to sue for the remaining moiety of the estate; and that the costs in all three Courts should be paid by the Appellants.'

The case having been next taken up by the Third Judge (S. T. Goad) he expressed his concurrence in the opinion recorded by the second Judge, with the exception of that part of it which expressly provided that Mussummat Seesphool was at liberty to sue for the remaining moiety of the estate. He did not deem it necessary to provide specially for her prefering a claim which she was at liberty to do under the general regulations, without such provision; especially as it appeared that the names of the Appellants had been registered with the consent of the Respondent's husband, as proprietors of one moiety of the estate claimed. The Fourth Judge (J. Shakespear) coinciding in this view of the case, a final decree was, on the 5th of November 1821, passed according to their concurrent opinion, which differed only in one particular, as above

specified, from that of the Second Judge.—Sel. S. D. A. Rep. Vol. III, p. 114 (New Ed. p. 152).

Calcutta H. C. A.—*The 22nd of March,* 1867.

Present:

The Hon'ble H. V. Bayley and Shumbhoo-nath Pundit, *Judges.*

Benee Pershad (Defendant) Appellant,
versus
Mussummat Moha-boodhy and others (Plaintiffs) Respondents.

Where the Mitákshará Law prevails, the widow of a member of a joint Hindú family cannot succeed to her husband in preference to the husband's brother, and is no heir to her brother-in-law or to his widow after their death.

Pundit, J.—Plaintiff claims as heir to Reut Lall, the deceased brother of Jumeeut Lall, plaintiff's late husband, who had before died. Her allegation is that she was in possession jointly with Lall Daee, the deceased widow of Reut, from the time of Reut's death.

Plaintiff never alleged in this case that she was in possession from the time of her husband who died before her brother-in-law. Further, the previous unsuccessful proceedings commenced first by Lall Daee (and to which plaintiff also was afterwards made a party) to get their names recorded in the place of Reut Lall after his death, show that plaintiff could never make such an allegation.

In this view we cannot understand upon what *data* the Lower courts made an issue regarding plaintiff's possession from the time of her husdand's death.

The decisions of both the courts were chiefly based on the fact that special appellant, defendant, had failed to prove that his father was *joint* with the husband and the brother-in-law of the plaintiff.

If these courts really intended to decide for the plaintiff on the ground that they were satisfied that she held independently as heir from the death of her husband, they should have noticed and explained how, in the district of Tirhoot under the Mitákshará Law, a widow of a deceased Hindú joint brother could hold or acquire

any right as heir to her husband in preference to her husband's brother in a joint undivided Hindû family living under that law. These courts could not but have observed that, even if plaintiff were allowed to hold in some way jointly with the male member of the family, that could not be as *of right*, and even if she had alleged and proved to have really held, we do not see how, as regards the half share of her husband, the courts could give a decree for possession to the plaintiff.

This half share, after the death of Lall Daee, must go to the special appellant, even if his father and other predecessors were living *separate* from the husband and the brother-in-law of the plaintiff. We, however, see that the very plaint of the plaintiff shows that she has no case on the grounds taken below, and there was no occasion to try such a claim.

We, accordingly, decree the special appeal with costs, and, reversing the decisions of both the Lower Courts with costs, dismiss the plaint of the plaintiff.—S. W. Rep. Vol. VII, p. 292.

Held that under the Hindú Law a widow was not entitled to inherit the estate of her husband's brother, and she having *no locus standi* in Court could not question the title of the party in possession of the disputed estate.—*Choora* and others v. *Mussummat Busuntee.*—Agra Rep. Vol. I, A. C., p. 174.

Held that a widow cannot under Hindú law claim to inherit the estate left by her husband's uncle, and cannot consequently question the title of the defendant (widow of another brother's son) who was admittedly in possession of the estate claimed.—*Mussammat Gouree* and others v. *Mussammat Oomrao Koonwar.*—Agra Rep. Vol. I, A. C., p. 149.

The childless widow of a Hindú being a separated brother, is heiress to *his own* estate, but has no right to a share of the estates of his brothers dying after him, and where of three brothers one died leaving a childless widow, and another leaving two sons, and the third not leaving either a wife or children, the widow was held to be entitled to her husband's property, obtained, whether real or personal, because he had separated from his brothers; but the real and personal property of the brother who died without wife or issue, devolved on the sons of the third brother, because the widow was

childless, and because the sons of a brother are declared to be heirs (on failure of the wife, daughter, her son, parents or a brother) of a man dying separated without male issue.—*Pran Sunker* and another v. *Pran Koonwur.*—Borr. Rep. Vol. I, p. 427.—Morl. Dig. Vol. I, p. 318.

Where ancestral property has been held according to the rule of primogeniture, and the family is governed by the law of the *Mitákshará*, that law, in the event of a holder dying without male issue, would, if the family were undivided, give the succession to the next collateral male heir in preference of the widow or daughters of the last possessor. Chowdhry Chintamun Singh *v.* Mussumat Nowluckha Konwari. Privy Council Judgment. The 1st July 1875. S. W. R., Vol. XXIV, pp. 255—258.

PRIVY COUNCIL.—*The 30th of November* 1863.

In the case of property, of which part is the common property of a joint Hindú family, and part the separate acquisition of a deceased brother, his widow (in default of male issue) succeeds to his separate estate.

There being a community of interest and unity of possession between all the members of a united family having common property, it follows that, upon the death of any one of them, the others may well take by survivorship *that* in which they had, during the deceased's life-time, a common interest and common possession.

But the law of partition shows that, as to the separately acquired property of one member of a united family, the other members of that family have neither community of interest nor unity of possession. The foundation, therefore, of a right to take such property by survivorship fails; and there are no grounds for postponing the widow's right to inherit it to any superior right of the co-parceners in the undivided property.—*Kattama Nauchiar* v. *The Rajah of Shiva-gunga.*—Sutherland's Privy Council Judgments, page 520. See Post p. 447.

Remark.—Previous to the passing of the above decision the following case was decided by the Madras High Court, in which a widow was deprived even of the self-acquired separate property of her husband. Such

determination seems not only contrary to the above ruling, but also contrary to the Hindú law itself.

By the law current in the Madras Presidency an undivided Hindú is entitled during his life-time to the separate enjoyment of his self-acquired immovable property; but on his death without male issue, such property, unless it has been previously disposed of, devolves on his surviving co-parceners, and his widow is only entitled to maintenance.—*Varadi-perumál Udaiyan*, Appellant, v. *Ardanári Udaiyan* and others, Respondents. The 29th of October, 1863.—Mad. H. C. Rep. Vol. I, p. 412.

PRIVY COUNCIL—*The 19th of February*, 1847.

Present:

Lord Brougham, Lord Longdale, Dr. Lushington, T. P. Leigh, Sir E. H. East, and Sir E. Ryan.

On Appeal from the Sudder Dewanny Adawlut for the N. W. Provinces.

REWUN PERSHAD

versus

MUSSUMMAT RADHA BEEBY.

A Hindoo testator, after the death of his widow, gave a moiety of his property to his brother A, and on his death to A's two sons B and C. A died in the life-time of the testator's widow, and a complete division of all A's property which was held in co-parcenary was agreed upon between B and C. B also died in the life-time of the testator's widow, and on the death of the testator's widow, B's widow claimed his share.

Held that B and C took A's moiety under the will as tenants in common, and that each of them had a vested interest in a one-fourth share, though the actual enjoyment was postponed until the death of the widow; and that the claim of B's widow was not barred by the doctrine of Hindoo Law that a widow succeeding as heir to her husband, cannot recover property not in the possession of her husband, which doctrine was held to be inapplicable to the case of property in which the husband had a vested interest under a will or deed, though the actual enjoyment thereof was postponed during the life-time of another.

According to the Hindoo Law a widow cannot claim an undivided property.

Fakir Chund died in the year 1814, and for the present we will call him the testator in this cause. He, in March 1814, executed an

instrument intended to regulate the disposition of his property after his death. That instrument is set out at length at page 44 of the appendix.

Fakir Chund, the testator, was one of three brothers; his elder brother was Bhowany Persad, who is stated to have divided from his family, which was originally an undivided Hindoo family; he left two sons, Dial Dass and Goonee Lall. The date of the death of Bhowany Persad is not stated, but it was before the month of March 1814. Bheekhary Dass was the youngest brother, and he died in 1817; he had three sons, the eldest, Koonj Behary, died in 1825, leaving a widow, Radha Beeby, the respondent in this appeal, but no male issue, Mudun Mohun, the second son, died in 1829, and he left a son, Rewun Persad, who is the present appellant; the third son died young, and there is no interest derived through him concerned in this litigation.

The property in dispute was the property of Fakir Chund, and all the parties agree that the instrument which he executed in March 1814, in triplicate, is a valid and operative instrument, and to be carried into effect.

Pursuant to the terms of that instrument on the death of Fakir Chund, in 1814, his widow, Mehtaboo, succeeded to the possession and enjoyment of his property. She died in 1833, and then a litigation arose as to who were entitled, and in what shares, to take the property of the testator.

It is not necessary to state the details of this litigation. In the result, Dial Dass took, under the decree of the Court, one moiety, and Rewun Persad was put into possession of the other moiety, but not so as to preclude any claim which Radha Beeby, the widow of Koonj Behary, might have to a share thereof.

Accordingly, she commenced a suit to recover a fourth share of the estate left by Fakir Chund, and for that purpose filed her plaint on the 1st of June 1855 in the Zillah Court of Mirzapore. Dial Dass compromised with the plaintiff, the present respondent, and Rewun Persad in effect became the only defendant, and is now the appellant. In short, the only question now to be determined is, whether the respondent, the widow Radha Beeby, as heir to her husband Koonj Behary, is entitled to recover from the appellant, Rewun

Persad, one-half of the moiety of the estate of Fakir Chund, which Rewun Persad is now in possession of.

Mr. Monckton, one of the Judges of the Appellate Court, on the 8th of April 1839, pronounced his opinion in favor of the respondent, and that the decree of the Zillah Court ought to be reversed. The papers in the cause having been submitted to the consideration of Mr. Taylor, another Judge in the same Court, his opinion agreed with that of Mr. Monckton, and accordingly, on the 29th of April 1839, a decree was pronounced reversing the decree of the Zillah Court dated the 14th of September 1838, in effect declaring that the respondent was entitled to recover one-fourth of the estate left by Fakir Chund; that the present appellant should pay to her as much as he had received beyond a fourth share of the said estate, and that Dial Dass should, if there was any deficiency, make good the same.

From this decree Rewun Persad has appealed to her Majesty in Council, and the question is, whether he ought, according to the law prevailing as to Hindú families in the district where the parties lived, to refund to the respondent so much of the estate of Fakir Chund as exceeds one-fourth thereof.

There are certain facts not in contest in this cause. All parties agree that the will or deed of Fakir Chund, whichever it may be called, is an operative instrument; that one moiety of his estate, on the death of his widow, Mehtaboo, became the property of the family of Bhowany Persad, and that one-fourth of the property belongs to the Appellant, Rewun Persad, through his father, Mudun Mohun, who died before Mehtaboo, *viz.*, in 1829. Neither is it denied that the remaining fourth became part of the estate of Koonj Behary, who died in 1825, in the same manner as the one-fourth became part of the property of Mudun Mohun, assuming it to have vested in either during their lives.

Again, it is admitted that, according to the Hindú Law of Succession, Radha Beeby, the respondent, became heir to the divided estate of Koonj Behary, he having died without male issue.

Radha Beeby, the respondent, being entitled to the estate generally of Koonj Behary, she is entitled to this one-fourth of the property of Fakir Chund, if it is become a part of the estate of Koonj Behary.

The appellant alleges, and alleges truly, that the respondent cannot recover from him the property of which he is in possession unless she proves her title. She asserts that she as heir is entitled to the whole, unless there be a special exception. The appellant alleges two grounds of exception :—

First.—That Koonj Behary and Mudun Mohun were two undivided brothers, and that this share of Fakir Chund's estate was undivided; that, by the Hindú law, therefore, the widow cannot claim it, though she be heir.

Secondly.—The appellant alleges that this property never was in possession of Koonj Behary; that, by the Hindú Law, the widow, though his heir, cannot claim property not in possession of the deceased husband, and that, for this reason, her claim must fail.

Now, as to the first grounds of defence, the law is not disputed. It is not denied that a widow cannot claim an undivided property. The decision of this question therefore turns upon a matter of fact, namely, whether Koonj Behary and Mudun Mohun were divided brothers or not.

We think that it may be admitted that the *prima facie* presumption, where there are no circumstances to affect it, is that every Hindoo family of this class was an undivided family, and, consequently this presumption must prevail, unless the circumstances of this case lead us to a contrary conclusion. We must, therefore, consider the circumstances, having, however, first directed our attention to some points of Hindú Law which may have a bearing on the conclusion to be drawn from the facts.

First.—We apprehend it to be undisputed that a division may be effected without an instrument in writing.

Secondly.—That a division may be either total or partial.

Thirdly.—That a separation from commensality does not, as a necessary consequence, effect a division of property, or, at least, of the whole undivided property.

Bheekhary Dass died in 1817, and by the instrument of March 1814, called the will of Fakir Chund, a moiety of his property, on the death of his widow, is given in these words :—"Let my brother, Bheekhary Dass, aforesaid, and, after the death of my said brother his sons, take one-half."

Now, we conceive that Bheekhary Dass, having died in 1817, in the life-time of the widow, the tenant for life, and his sons surviving him, this moiety was not a part of his estate, properly speaking, and that, therefore, *primâ facie*, it could not be divided as part of the estate of Bheekhary Dass.

The Pundit of the Sudder Adawlut of Calcutta gave in his bewusta. The opinion of this Pundit supports the claim of the widow whether there had or had not been a division of Bheekhary Dass's estate between his two sons.

The decision of Mr. Monckton, the Judge of the Sudder Adawlut of Allahabad, before whom the cause first came, is in favor of the widow (page 86).

The true question, then, before us, is whether we are convinced by the arguments of the appellant that this decision is erroneous; for if not so convinced, it must be affirmed.

We think, on a consideration of all the circumstances, that a complete division of all the property of Bheekhary Dass which was held in coparcenary was agreed upon between the brothers, and we think so from a consideration of all these papers.

So stands the case upon the pleadings. A division is admitted, and no particular exception alleged. The objection of Rewun Pershad is not that there was a special exception of the disputed property, but that from the nature of the property it was necessarily excepted.

We do not think that there is any thing in the nature of the disputed property which should except it from a general division. The testator, after the death of his widow, gives his property to his brother, Bheekhary Dass. On his death it becomes divisible into two parts, one moiety to the sons of Beekhary Dass. We apprehend that they would take as tenants in common—in fact, that they had each of them a vested interest in one-fourth share not to come into actual enjoyment till the death of the widow. But here was no contingency, as contended for by the appellant. The only uncertainty was the period of enjoyment.

We are inclined, indeed, to the opinion that this property was not properly the subject of any division at all, but that the division was effected by the deed or will, and that each brother took one-fourth as a divided property.

In the Sudder Adawlut, however, much more important evidence was produced, *viz.*, the proceedings in an action brought by Mudun Mohun in 1825. In that suit Mudun Mohun pleaded the division of the paternal estate, and the separation from his brother Koonj Behary.

We think that this averment by Mudun Mohun, and which was supported by evidence is strong proof against Rewun Pershad, who claims through him, that a division and separation had taken place.

And herein we agree with Mr. Monckton, that the fact of Rewun Pershad not having specified any exceptions to the partition being of the whole of the paternal property, is evidence that their were no exceptions.

We think that, upon a consideration of these premises, we are justified in concluding, if such conclusion be necessary for the decision of this case, that a complete division and separation did take place between Koonj Behary and Mudun Mohun.

It may be well here to notice another argument which was strongly pressed on behalf of the appellant. It was said that the widow, as heir, could not claim any property of her husband which was not in possession at the time of his death; that the disputed property was, at that period, and for years afterwards, in the possession of Mehtaboo, and that, consequently, Radha Beeby can have no claim to it.

There is not the least reference to it in the opinion of the Pundit of the Sudder Adawlut of Allahabad, nor in that of the Pundit of the Sudder Adawlut of Calcutta, not in the Judgment of Mr. Monckton, in which Mr. Taylor concurred. We think that it would be impossible, under such circumstances, for us to reverse the decree of the Court below on that ground. Indeed, this averment of the law is not even one of the grounds of appeal.

We have no intention whatever to disturb the doctrine of Hindoo Law that a widow succeeding as heir to her husband, cannot recover property not in possession of her husband. But we think that it has not been shown in this case that the disputed property was not in possession according to the meaning of that term in Hindoo Law, nor that the doctrine applies to a property where the

husband had a vested interest under a will or deed, and the actual enjoyment thereof was postponed during the life-time of another.

We proceed then to determine this case, on the assumption that there was a complete division between the two brothers, and that the law, as to possession by the husband, does not, under the existing circumstances, bar the widow's claim.

We do not think that this property was bequeathed to the two brothers as joint tenants. But even if it were, we should incline to the opinion that the division extended to it. We therefore come to the conclusion that, either the disputed property was never held in joint tenancy, or that if so held, it was divided, and consequently we affirm the judgment, on the grounds taken by the Pundits in the Sudder Adawlut, and adopted by the two Judges of that Court, and it must be affirmed with costs.—Sutherland's Privy Council Judgments, p. 172.—S. W. R. Vol. II, p. c. pp. 35-40.

The doctrine of Hindú law that a widow, succeeding as heir to her husband, cannot recover property of which he was not possessed is inapplicable when the husband has vested interest under a will or deed, the actual enjoyment being postponed.—*Hurro Soondary Debea Chowdhrain* v. *Rajessury Debea.*—H. C. A. The 3rd of May 1865. S. W. Rep. Vol. II, p. 321.

BOMBAY H. C. A.—*The 9th of October* 1867.

PÁRVATÍ KOM DHONDI-RÁM, Appellant,

BHIKÚ KOM DHONDI-RÁM, Respondent.

D, a *Pardesi* Hindú residing at Násik, died leaving two widows, B and P; B, who was the first wife, though not incontinent, had been turned out of his house by her husband some time after he married P by *pát.*

In a suit by B, to recover a moiety of D's estate, P, while admitting that she herself had been leading a life of prostitution since D's death, resisted a partition of his estate, on the grounds that, B had since D's death cohabited with M, and subsequently married with R; both of which allegations B denied.

***Held*, that, though, by Hindú Law, incontinence excluded a widow from succession to her husband's estate, yet if the inheritance were once vested, it was not liable to be divested, unless her subsequent incontinence were accompanied by degradation; but that, by Act XXI, of 1850, deprivation of caste can no longer be recognised as working a forfeiture of any right or property, or affecting any right of inheritance.**

Held, however, also that if B, had duly remarried, she would cease to have any right to recover or hold any part of her late husband's property; and, as the District Judge, on appeal, had left the fact of B's remarriage unascertained, that his decree must be reversed, and the case remanded for a finding on that question.

Westropp, J.—This is an action by Bhikú against Párvatí and her father, Mán-sing, to recover from them Rs. 2, 392, alleged to be the moiety in value of the estate of Dhondi-rám, deceased.

The first wife of Dhondi-rám was Bhikú. Subsequently he married, by *pát*, Párvatí, who was then a widow; and about one year and a half afterwards, he turned his first wife, Bhikú, out of his house. The Judge finds that, during Dhondi-rám's life-time, Bhikú neither deserted him nor was unchaste. Dhondi-rám died in Posh, Shake 1871 (December 1859). The defendant Párvatí possessed herself of his property, movable and immovable.

Párvatí (who, the Judge states, admitted that, since Dhondi-rám's death, she has been living as a prostitute) resisted a partition of the property, on the ground that, subsequently to the death of Dhondi-rám, Bhikú had cohabited with Mirdha valad Narayan, and afterwards married one Rám-sing, both of which allegations Bhikú denied.

Where there are two widows, who were both the lawful wives of a deceased Hindú, who dies separate and without leaving male issue, they succeed to equal moieties of his property, movable and immovable: West and Buhler, Bk. I, pp. 88, 89, 91; *Mayúkha,* Ch. IV, Sec. VIII, pl. 9; 1, W. H. Macnaghten, H. L. 19; Steele, p. 43, para. 25, and p. 232, para. 72; *Doe dem. Bhagobutty Raur* v. *Radakissen Mookerjee**, *Ramía* v. *Bhági*†, *Sree Muttee Muttee* v. *Ramconny Dutt*‡; and see *Rindamma* v. *Venkata-ráonappa*.§

But if either widow remarry after the death of her husband, she can neither recover nor retain a share of his property. By remarriage she forfeits her right to it. This is so by Hindú Law.‖

If, therefore, Bhikú actually married Rám-sing, she must fail in this suit.

But as, upon the Judge's decree, we are unable to say whether she married Rám-sing or merely cohabited with him, it behoves us to consider what is the legal result of the incontinence of a Hindú

* Supplt. to Morton's Rep. by Montriou, 314. † 1 Bom. H. C. Rep. 66. Post, p. 255.
‡ East's Notes; 2 Mor. Dig., pp. 80, 81, 82. § 3 Mad. H. C. Rep. 268.
‖ Steele, pp. 170, 177; West and Buhler, BK. I, pp. 96, 99.

widow, who, as we are bound to hold in the present case, continued virtuous during her husband's life-time, and in whom, accordingly, at his death, a moiety of his property vested in interest, although she has been kept out of possession of it by his other widow.

By Hindú Law, incontinence excludes a widow from succession to her husband's estate; Mayúkha, Chap. IV, Sec. VIII, pl. 2, 4, 8, 9*; Mitákshará on Inheritance, Chap. II, Sec. i, pl. 19, 29, 30†; Dáya-krama Sangraha, Chap. I, Sec. ii, pl. 3‡; 2 W. H. Macnaghten 20, 21; *Doe dem. Rada-money Raur* v. *Neel-money Dass*§; 3 Colebrooke's Dig. 474, 478, 479, 576, paras ccccv, ccccviii, ccccix, ccccIxxvii. Some of the above quoted writers speak of suspicion of incontinence as sufficient to justify her exclusion. But the better opinion seems to be that nothing short of actual infidelity disqualifies: 1 Stra. H. L. 136; 2 *Ibid.*, note by Mr. Ellis, p. 271; Steele‖, a high authority on this side of India, and Macnaghten¶ speak of adultery or incontinence, and nowhere of mere suspicion of those sins, as affecting the widow's right to succeed to or hold the property of her husband. If, however, the inheritance be once vested in the widow, it is not, by Hindú Law, liable to be divested, unless her subsequent incontinence be accompanied by "loss of caste, unexpiated by penance and unredeemed by atonement:" 1 Stra. H. L. 136, 163, 164, 244. Mr. Sutherland also rests the forfeiture on degradation from caste. See his remark in 2 Stra. H. L. 269, Appendix. So too Mr. Colebrooke says: "Nor after the property has vested by inheritance, does she forfeit it, unless for loss of caste, unexpiated by penance, and unredeemed by atonement." See his remark 2 Stra. H. L. 272, App. Not only incontinence after the husband's death (Steele, p. 41, para. 23,) but in many cases, even adultery in his lifetime, may be expiated by penance.**

There has not been any finding in this case as to whether Bhikú had been put out of caste; or, if so, whether she has since, by penance, expiated her incontinence, if any. We have, however, arrived at the conclusion, that modern legislation has rendered those questions immaterial, At the first glance at Act XXI of 1850, we had

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* Stokes' H. L. Bks., pp. 84, 86. † *Ibid.*, pp. 432, 436. ‡ *Ibid.*, p. 474.

§ Supplt. to Morton's Rep. by Montriou, p. 314.

‖ p. 43. para. 25; pp. 173, 174, para. 19; and see per *Arnould*, J., 1 Bom. H. C. Rep. 66. ¶ 2 W. H, Macnaghten, 20, 21.

** Steele, pp. 39, 40, para. 19; pp. 172, 173, 174, paras., 15, 19.

some doubts, arising from its preamble, whether the Act applied to the case of a widow degraded from caste on the ground of incontinence. But a closer examination of that enactment removed the doubt. The Legislature did not simply extend the Bengal Reg. VII of 1832, Sec. ix, which is set forth in the preamble, to the rest of British India; but, reciting that it would be beneficial to extend its "principle" throughout British territory, enacted that "so much of any law or usage, now in force within the territories subject to the Government of the East India Company, as inflicts on any person forfeiture of rights or property, or may be held in any way to impair or affect any right of inheritance, by reason of his or her renouncing, or having been excluded from the communion of any religion, or being deprived of caste, shall cease to be enforced as law in the Courts of the East India Company, and in the Courts established by Royal Charter within the said territories." The Act is not limited to renunciation of religion only, but, after providing for that case, specially includes deprivation of caste, and is not restricted to deprivation of caste on any particular ground. Hence deprivation of caste, whether it be for change of religion, or for unexpiated incontinence, or any other cause, can no longer be recognised as either working a forfeiture of any right or property already vested in interest, or as impairing or affecting any right of inheritance.*

We have consulted the Chief Justice and our other learned brethren usually sitting at the Appellate Side of the Court, and find that they concur in that view of Act XXI of 1850, which appears to have been the same as was taken by Sir Lawrence *Peel*, C. J., in *Doe dem. Sham-money Dasee* v. *Nemy Churn Dass*, a case decided in July 1851. The lessor of the plaintiff was a Hindú widow, who had inherited her husband's property, but had been deprived of possession, and sued to recover it. The defence was that she had forfeited her right in the property, by reason of her having, since his death, led an immoral and unchaste life. Peel, C. J., referring to Act XXI, of 1850, gave a verdict in her favour.

We must hold that, although Bhikú may have been incontinent, and may consequently have been expelled from caste, she would not, upon those grounds, be disqualified to obtain a partition in her favour of Dhondi-rám's property.

* See, however, Post p. 255.

If, however, she have duly remarried, she would cease to have any right to recover or hold any part of the property of Dhondi-rám. The Judge having left the fact of remarriage unascertained, we must reverse his decree, and remand the cause for the determination of that question.

Warden, J., concurred.

Bom. H. C. Rep. Vol. IV, p. 25.

Held that incontinence of plaintiff is established, and the right of succession which by Hindú law she thereby forfeited is not affected by the provisions of Act XXI, of 1850, which refer to the renunciation of the Hindú religion and not to a case of incontinence.—*Raj-koomaree Dassee, v. Golabee Dassee.**—Cal. S. D. A. Dec. for 1858, p. 1891.

BOMBAY, H. C.—*The 11th of September* 1862.

RAMIÁ widow, *Applicant.*

BHÁGI widow, *Caveatrix.*

Where a Hindú dies intestate leaving no issue and several widows, the widows succeed equally, and are entitled to equal shares in his estate, and the ordinary course would be to grant them a joint administration.

Infidelity in a wife, or incontinence in a widow, in order to constitute a disqualification to inherit, must be positively proved, or at any rate there must be a reasonably well-grounded suspicion of its having taken place.

Arnould, J.—This is a question between two widows of a deceased Hindú as to which of the two has the right to administer. The admitted facts are—(1) That deceased died intestate and childless on 20th January 1862. (2) That Ramiá, the applicant, is the elder widow, having been married to the deceased about thirty years ago; that she left his house some four or five years ago, and did not return to it till after his death. (3) That *Bhági* the caveatrix, is the younger widow, having been married to the deceased about eight years ago, and that she continued from her marriage to live with him till his death. The evidence taken altogether shows this:—that till the second marriage Ramiá and her husband had

* This case will be found in extenso in the *Vyavasthá, Darpana,* (second edition).

not been on bad terms; that after the second marriage quarrels arose; that Ramiá left her husband's house secretly with Rakhmi and Sitá-rám. It is not proved that she took her jewels with her, nor that she lived in concubinage with Sitá-rám or any one else.

On the other hand, I think, it is made out that she lived quietly and decently at her father's house; On the whole I think the evidence fails to prove adultery in Ramiá, fails even to make out a case of suspicion of unchastity, but does show misconduct in her as a wife in absenting herself from her husband's roof, without sufficient cause (according to Hindú manners and feelings), and refusing to return at his request.

Against the other widow nothing whatever is alleged.

Has either of these two widows an exclusive right to the property here? According to Sir T. Strange, Vol. I, pp. 136, 137 (ed. of 1830), "when a man has left more widows than one, and no son by any" (which is the present case), "she who was first married, being the one who is considered to have been married from a sense of duty, succeeds in the first instance, the others inheriting in their turn as they survive, entitled in the meantime to be maintained by the first." But Sir T. Strange refers, in his notes on this passage in his text, to p. 56 of the same volume, where we find this: "it is the elder or first widow that succeeds eventually to her husband as heir, maintaining the others, who inherit in their turn on her death, &c." But note 7 queries the position, and refers us to the *Mayúkha* a work of great authority on this side of India. At p. 59, para. 19, of the *Mayúkha* (Borradaile's Ed.*) we find that "even childless wives of the father are pronounced equal sharers." And again at page 103, para. 9, "The wife if faithful takes the wealth, but if *there be more than one they will divide and take equal shares;*" and this doctrine has been followed by the late Supreme Court in a case of the goods where the Court, after consideration and obtaining answers from the *Shástrís* of the Suder Adalat and at *Puná*, held that "if there be more than one widow, each of them is entitled to an equal share of the property." It appears from those answers that, although the author of the *Mayúkha* cites no text in support of his opinion, such texts are to be met with in the *Virámitro-daya*, an authority of the Benares school, and Macnaghten's Principles of Hindú Law,

† Stoke's Ed. pp. 52 and 86.

a work of authority in Bengal. It is also said, p. 19 of the latter work (Ed. of 1829), that if there be more than one widow their rights are equal. The case in Morton's Reports, p. 314, shows that this rule was acted upon by the Supreme Court in Calcutta as early as the year 1791; and in Morley's Digest, Vol. I, New Series, Title "Hindú widows," p. 180, s. 15, we find an instance of its being acted upon in the North-Western Provinces in 1850. On these authorities we hold that the widows in this case are *primâ facie* entitled to equal shares of the property, and it remains to be considered whether either of them is disentitled by misconduct to a share, and if not, then whether we ought to grant administration to them jointly, or to one only, and, if the latter, to which of them. As to the general doctrine, that *proved* infidelity before widowhood disqualifies, and proved incontinence after widowhood divests the inheritance, the authorities seem to clash; and as to the nature of the proof of incontinence that disqualifies there is again a discrepancy in the authorities. Sir T. Strange, p. 136, after laying down the principle that "an unchaste wife is excluded from the inheritance," adds "that nothing short of actual infidelity in this respect disqualifies," and the authorities collected in the Appendix to which he refers support this view. In all the cases we have been able to consult, the proof of incontinence or infidelity seems to have been positive. The *Mayúkha*, on the other hand, p. 102, lays it down, "That even a suspicion of incontinence is enough to reduce a widow's rights to that of mere maintenance." This, as it seems to us, can hardly mean vague suspicion; it must mean a reasonably well-grounded suspicion short of actual proof. In this case, for instance, had Ramiá gone off with Sitá-rám alone, and been proved afterwards to have been in company with him at a distance from her husband's residence, this would probably have constituted a case of suspicion sufficient to deprive her of inheritance on the authority of the *Mayúkha*. But the proof here falls short of that. It does, however, show such misconduct as would render us reluctant to confer the administration on her to the exclusion of the younger, irreproachable widow. On the whole, we strongly recommend that the Administrator General should be requested to take the administration on himself. If this

suggestion is not acted on, we should be driven to grant a joint administration.*—Bom. H. C. Rep. Vol. I, p. 66.

It appears, therefore, that a Hindú widow is not bound to reside with the relatives of her husband; that the relatives of her husband have no right to compel her to live with them; and that she does not forfeit her right to property or maintenance merely on account of her going and residing with her family, or leaving her husband's residence from any other cause than unchaste or improper purposes.†—Part of the Privy Council Decision in *Rajah Perthee Singh* v. *Raj Kooer* alias *Rani Shib Kooer*—B. L. R. Vol. XII, page 238.

See the Privy Council Decision in Káshí-náth Basák and Ramá-náth Basák *versus* Hara-sundarí Dásí and Kamal-mani Dásí, upon which the above decision is based and which is to be found in the *Vyavasthá Darpana* (2nd Ed. p. 97) and some other books.

A Hindú widow does not forfeit her right to succession by removing from the family dwelling house of her deceased husband.—*Oma Dabea* and others v. *Kishen Munee Dabea*.‡—Sel. S. D. A. Rep. Vol. VII, p. 270. (New Ed. p. 323.)

Although the Shástras impose on a widow the duty of living with her deceased husband's relatives, the duty has been regarded by the British Courts as a moral duty which they will not lend their aid to enforce, and of which the non-performance does not deprive the widow of her right to inherit.—*Umrit Kowaree* v. *Kedar Nath Ghose* and others. Agra Rep. Vol. III, p. 182.

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* Note.—Mr. Justice Strange, of the High Court at Madras, in his "Manual of Hindú Law prevailing in the Presidency of Madras" (2nd Ed., para., 326), lays it down that in Southern India the law is that the wives are viewed on an equality, and inherit jointly, and cites the Mitákshará, II, i, a clause omitted between clauses five and six of Colebrooke's translation.

† See the Chapter on Maintenance in which the above case is given *in extenso*.

‡ That part of the main decision of which the above is an abstract is as follows:—Is the plaintiff debarred from suing by the fact of her having chosen to reside in the family of her father instead of that of her hubsand? On this point the decision of the Privy Council in the case of *Káshí-náth Basák* versus *Hara-sundarí Dásí* and another (See page 85 Morton's Reports,) is, in the opinion of the Court, quite decisive as to the right of the plaintiff to sue.

One Venkanna Gandu died leaving no son but two widows—Krishnamma and Rindamma. A dispute having arisen, Krishnamma brought a suit against Rindamma and obtained a decree dividing equally between them the lands of the deceased husband. Krishnamma took possession of her moiety and held the same till her death when Rindamma took possession.

In a suit by the sons of the deceased daughter of Krishnamma against Rindamma for the share formerly held by Krishnamma:—

Held, that they were not entitled in preference to the surviving widow. They may have a good title as next heirs of the husband upon the death of the defendant, the surviving widow.—*Rindamma* v. *Venkata-ramappa* and four others.—Mad H. C. R. Vol. III, page 268.

One of the two widows who had succeeded to their late husband's landed property in separate possession, made over her share, by a deed of gift, to her husband's illegitimate son, who, on her death, sued the surviving widow for the share of the donor. *Held* that he had no claim as the widow had no power to alienate the property, except for the performance of funeral rites, or for her own subsistence.—*Gunput Singh* v. *Mussummat Ranee Chouhan*.—N. W. Decis. Vol. V, p. 202.—Morl. Dig. N. S. Vol. I, p. 180.

A second widow succeeds to the inheritance on the death of the first.—*Sree Vutsavoy Jugga-nadha Rauze* v. *Sree Vutsavoy Boochee Seetiah*.—Case 5 of 1824. Mad. Dec. Vol. I, p. 453.—Morl. Dig. Vol. I, p. 313.

If a Hindú die without issue, leaving two widows, they take his whole estate for life; and on the death of one, the whole survives to the other, upon whose death it goes to the collateral heirs of the husband.—*Sreemutee Brojessury Dossee* v. *Ram-cony Dutt* and another.—East's Notes. Case 54.

Widow's Powers over her Inherited Property.

Privy Council.—*The 21st of December* 1861.

Present:

Lord Justice Knight Bruce, Lord Justice Turner,
Sir J. T. Coleridge, Sir L. Peel, and Sir J. W. Colvile.

On Appeal from the Sudder Dewanny Adawlut at Madras.

The Collector of Masulipatam,
versus
Cavaly Vencatta Narainapah.*

Under the Hindú Law a widow, though she takes as heir, takes a special and qualified estate. If there be collateral heirs of her husband, she cannot, of her *own will*, alienate the property except for special purposes. For religious or charitable purposes, or those which are supposed to conduce to the spiritual welfare of her husband, she has a larger power of disposition than that which she possesses for purely worldly purposes. To support an alienation for the last, she must show necessity. The restrictions on her power of alienation are inseparable from her estate, and independent of the existence of heirs capable of taking on her death. If for want of heirs, the property, so far as it has not been lawfully disposed of by her passes to the Crown, the Crown has the same power of protecting its interest as an heir by impeaching any injurious alienation by the widow.

Where an opinion, apparently discordant from works of current and established authority is delivered by Pundits, it must not be taken on their authority to be a correct exposition of the law. They should be questioned further as to authorities, usage, and generally received opinions.

The acts of a Government officer bind the Government only when he is acting in the discharge of a certain duty within the limits of his authority, or, if he exceed that authority, when the Government, in fact or in law, directly, or by implication, ratifies the excess.

The *onus* is on those who claim under an alienation from a Hindú widow to show that the transaction was within her limited powers.

This cause has come before their Lordships on appeal for the second time. They regret to find that they are still without the means of satisfactorily determining the long litigation between the parties.

The zemindary, which is the subject of the suit, was claimed by the appellant on behalf of the Government of Madras, as an escheat

* This case is considered to be the leading case on the subject of a widow's succession and power over her inherited property. *Vide* Norton's Leading Cases, part II, p. 618.

to which the Crown became entitled on the death of the widow of the last male zemindar, of whom there were no heirs in remainder to the widow; and he claimed to have it free, and discharged from all incumbrances with which it had been charged by the widow during her enjoyment of it.

The respondent disputed the right of the Crown to take the particular property by escheat in any circumstances; and insisted that, even if that right existed, he had a title to the zemindary paramount to that of the Crown by virtue of a razee-namah executed in his favor by the widow in her life-time. His case as to this was, that his father had made advances to the widow for some of the purposes which, under the Hindoo Law, justify the alienation by a widow of immovable property inherited from her husband, and had obtained a decree for the amount of the debt; that after his father's death he had taken out execution on that decree, and that to stay his execution the razee-namah had been executed. He further contended that this had been done with the sanction and under the advice of the then Collector of the District, and that the Government was estopped from disputing the transaction, if it could otherwise have done so, by the conduct of its officer.

The razee-namah was in the nature of an agreement for the payment of the judgment-debt by instalments, with stipulations that if default were made in the payment of any instalment, the whole sum should become due, and that the judgment-creditor should be put into possession of twelve out of the fourteen villages comprising the zemindary (which were to be impledged to him) and should, on her death, take possession of the two other villages, and hold the whole zemindary as his absolute estate. No instalment was paid by the widow, nor yet was possession taken under the razee-namah in her life-time. The respondent, however, alleged that it was by reason of an order of the Sudder Court, suspending the execution of the razee-namah, in consequence of proceedings in another suit, that he failed to get possession.

It follows from this statement that the questions to be determined in the cause were, whether the Crown had any title by escheat to the lands; and, if so, whether that title had been defeated, either absolutely or to the extent of any subsisting charge, by the acts of the widow in her life-time. The latter question involved the consi-

deration of the powers of a Hindoo female taking her husband's estate by inheritance, and whether the transaction relied upon by the respondent was an act done *bonâ fide* in the exercise of her powers, or a mere colorable contrivance for transferring the property to the respondent in spite of her disabilities.

In the judgment of the Sudder Adawlut, which was the subject of the first appeal, the Court has dealt with the first of these questions only. It held that the property having bolonged to a Brahminical family, the Crown had no right to take it by escheat, though on the clearest failure of heirs: and therefore dismissed the suit on that ground, without adjudicating upon the other questions raised in it.

Upon the appeal, however, the whole case was, more or less, fully argued. Their Lordships came to the conclusion that the judgment of the Sudder Adawlut was erroneous; that the Crown was entitled to take the property of a Brahmin as of any other Hindû subject, dying without heirs.*

The case went back to Madras, and was re-heard by the Sudder Adawlut there. In the judgment pronounced on the 22nd of October 1860, the Judges stated that—Admitting the right of the Crown to take by escheat property of which the last owner died without heirs, they held that where there had been an assignment by that owner though a female, the Crown could not take the place of an heir to challenge her power to make that assignment. They, therefore, decided that the suit, having been brought upon the erroneous assumption that the Crown had the power to challenge and defeat the act of the last incumbent, should be dismissed.

They next decided that, even if the Crown had the right contended for, it was estopped from asserting it by the acts of the Collector, and the sanction given by him to the razee-namah of 1841.

They, lastly, decided that, even if the Crown could now challenge the alienation in question, the plaint had not been properly framed for that purpose.

It is with the appeal against this judgment that their Lordships have now to deal.

* This decision of the Privy Council will be found in the Section treating of Escheat to the Ruling power.

The first conclusion of the Sudder Adawlut, however, involves a question of substance—an important question of Law; and if their Lordships were satisfied that it was well-founded, they would be disposed to prevent its being met by the objection, in some degree formal, of its inconsistency with the order of Her Majesty, by taking measures to procure the variation of that order. They, therefore, proceed to consider—*first*, whether the conclusion is, in fact, correct.

It was justly observed in the course of the argument, with reference to those authorities which speak of the widow's interest as a life-estate; that great confusion arises from applying analogies derived from the English Law of real property to the Hindú Law of inheritance; and that, when so applied, the terms by which we describe estates in land under the English Law are more likely to mislead than to direct the judgment aright. It may, however, be doubted whether the argument, on behalf of the respondents, does not really require some such process of reasoning to support it, the Hindú widow, it was urged, has an estate of inheritance, not a life-estate; the original estate, it is said, devolves on her in a course of succession derived from the husband, who had in him an estate of inheritance which she takes as heir. Yet, what is this, in effect, but to apply the English Law regulating the descent of lands in fee simple from ancestor to heir?

It is clear that, under the Hindú Law, the widow, though she takes as heir, takes a special and qualified estate. It is a qualified proprietorship, and it is only by the principles of the Hindú Law that the extent and nature of the qualification can be determined.

It is admitted, on all hands, that if there be collateral heirs of the husband, the widow cannot, of *her own will*, alien the property except for special purposes. For religious or charitable purposes, or those which are supposed to conduce to the spiritual welfare of her husband she has a larger power of disposition than that which she possesses for purely wordly purposes. To support an alienation for the last she must show necessity. On the other hand, it may be taken as established that an alienation by her, which would not otherwise be legitimate, may become so if made with the consent of her husband's kindred. But it surely is not the necessary or logical consequence of this latter proposition that in the absence of

collateral heirs to the husband, or on their failure, the fetter on the widow's power of alienation altogether drops.

Nor does it appear to their Lordships that the construction of Hindú Law, which is now contended for, can be put upon the principle of *cessante ratione cessat et ipsa lex.* It is not merely for the protection of the material interests of her husband's relations that the fetter on the widow's power is imposed. Numberless authorities, from Menu downwards, may be cited to that, according to the principles of Hindú Law, the proper state of every woman is one of tutelage; that they always require protection and are never fit for independence. Sir Thomas Strange (See "Strange on Hindú Law", Vol. I, page 242,) cites the authority of Menu for the proposition that, if a woman have no other controller or protector, the king should control or protect her. Again all the authorities concur in showing that, according to the principles of Hindú Law, the life of a widow is to be one of ascetic privation (2, "Colebrooke's Digest," 451). Hence, probably it gave her a power of disposition for religious, which it denied to her for other, purposes. These principles do not seem to be consistent with the doctrine that, on the failure of heirs, a widow becomes completely emancipated; perfectly uncontrolled in the disposal of her property; and free to squander her inherited wealth for the purposes of selfish enjoyment.

Their Lordships cannot but think that, if the consequences of the failure of heirs of the husband were such as they are now argued to be, there would be some decision on a case so likely to have happened before, or, at all events, that there would be some trace of so startling an exception to the general rule of Hindú Law touching females taking by succession the property of males, in the ancient text-writers and commentators. The proposition, however, rests upon the argument founded on the nature of the Hindú female's estate as an estate of inheritance; upon a passage from a modern treatise by Mr. Strange, for which no authority is cited; and upon the opinion of the pundits. The *first,* for the reasons already given, their Lordships consider unsatisfactory. The *second* cannot be treated as more than an opinion, though an opinion deserving of respect and attention. Upon the *last,* their Lordships can but repeat an observation made by them in a late case, to the following effect:—" Where an opinion apparently discordant from works of current and established

authority, is delivered by pundits, it must not be taken on their authority to be a correct exposition of the law. They should be questioned further as to authorities, usage, and generally received opinions. Such an enquiry might produce a conviction that the pundits on a new case delivered rather their own notions of expedient law, as law, than delivered it on the force of the opinions of any writers or authoritative expounders of the Hindú Law."

Their Lordships are of opinion that the restrictions on a Hindoo widow's power of alienation are inseparable from her estate and that their existence does not depend on that of heirs capable of taking on her death. It follows that if, for want of heirs, the right to the property, so far as it has not been lawfully disposed of by her, passes to the Crown, the Crown must have the same power which an heir would have of protecting its interests by impeaching any unauthorized alienation by the widow.

Their Lordships, therefore, dissent from the first ground on which, by the judgment under appeal, the Sudder Adawlut has dismissed the appellant's suit.

The next consideration is, whether the Sudder Adawlut was right in holding that the Crown is estopped by the act of the former Collector, Mr. Grant, from disputing the title asserted by the respondent under the razee-namah. In their Lordship's opinion, the principles of estoppel do not support this contention. On every reasonable presumption the facts relating to the creation of the original debt were known to the respondent, or to the original plaintiff in the suit whose judgment he was enforcing. The Collector would have no necessary knowledge on the subject, nor is he proved to have had actual knowledge. His advice to the widow to the effect that unless she made an arrangement with the creditor, the estate (which, the sale being an execution-sale, must be taken to mean her right, title, and interest in the estate) would be sold, is not a statement at variance with the true state of things. The razee-namah into which she entered, might, for aught that appeared, be satisfied by payment of the instalments in her life-time. Again, the acts of a Government officer bind the Government only when he is acting in the discharge of a certain duty within the limits of his authority, or, if he exceed that authority, which the Government, in fact, or in law, directly, or by implication, ratifies the excess. The Collector in this case had

certainly no authority to waive the rights to which Government might become entitled by the escheat; nor were his acts, when fairly viewed, calculated to give rise to the supposition that he had such an authority.

Their Lordships have already indicated their opinion that it is too late to assert, if it could ever have been successfully asserted, that it is not open to the appellant on these pleadings to question the validity of the widow's alienation against the Crown. The reasoning of the Sudder Adawlut on this point seems to their Lordships to involve some misconception of the effect of the decree under which the respondent claims. As regards the appellant, that decree is *res inter alias acta*. He is, therefore, in a very different position from one who, coming into Court to get rid of a decree binding upon him, has to allege and prove that it was fraudulently or collusively obtained, or is open to some other definite objection.

Again, though particular circumstances may shift the burthen of proof, the general rule certainly is, that it lies upon those who claim under an alienation from a Hindú female to show that the transaction was within her limited powers.

Their Lordships continue to think that the evidence before them is not such as to admit of a satisfactory decision of the question whether the razee-namah does to any, and what, extent, constitute a charge on the zemindary as against the Crown, and that there ought to be a further trial of that issue. Under the former order of Her Majesty, the Sudder Adawlut should have given to each party, if so disposed, an opportunity of adducing further evidence. It does not appear to have done this, but to have acted on its own impression that no further evidence was necessary. Such at least is their Lordships' understanding of the preliminary statements in the judgment under appeal.

In these circumstances their Lordships propose humbly to recommend to Her Majesty that the present appeal be allowed; that it be declared that the Crown, taking by escheat, the same right to impeach the alienation by the widow which the next heirs of the husband (if such there had been,) would have had, and are not estopped from asserting that right by the acts of the Collector in 1848; that the Crown is not bound by the decree, and that the widow was not entitled to alienate without the consent of the Crown, except

in so far as she could have alienated without the consent of the next heirs of the husband, if such there had been, but that the respondent is, at all events, entitled to a charge upon the estate, and to be paid and satisfied thereout, the full amount of all such of the advances, if any, made by the respondent's father to the widow as were made for purposes for which according to the Hindú Law, she would have been entitled to alienate the estate, as against the next heirs of her husband, if such there had been, in so far as she had not other estate of her husband to answer such purposes, and that the cause be remitted to the Sudder Adawlut to enquire whether, having regard to the declarations aforesaid, the right of the Crown was absolutely defeated by the razee-namah, and, if not, to enquire what advances, if any, were made by the Respondent's father to the widow, and whether all, or any, and which, of such advances, and to what amount, were made for purposes for which, according to the Hindú Law, the widow would have been entitled to alienate the estate as against the next heirs of her husband, if such there had been, and whether the widow had, when such advances were respectively made, other estates of her husband sufficient to answer such purposes, and the parties respectively are to be at liberty to adduce further evidence touching the matters aforesaid, or any of them, as they may be advised, and the Sudder Court is to proceed in the cause according to the result of the said enquiries.—Moore's Indian Appeals, Vol. VIII, p. 529. Sutherland's P. C. Judgments, p. 476.

The widow of a Hindú dying without any known heirs may convey absolutely his estate as against all but the King.—*Doe dem. Shib-nauth Roy* v. *Bunsook Buzzary.* East's Notes. Case 73.—Morl. Dig. Vol. I, p. 283.

A Hindú widow cannot alienate movable or immovable properties acquired by her out of the funds derived from the income of her husband's estate. Such properties descend to the heirs of the husband and not of the widow. Where, however, a widow held under a deed which conveyed the property to her to enjoy for her life-time, and to incur all needful expenses, *held* that she was entitled to invest sums out of the income for the benefit of her daughter and grand-daughter in the purchase of immovable property for

their maintenance.—*Chowdry Bhola-nauth Thakoor* v. *Mussummat Bhugbuti Deyi; Mussummat Bhugubuti Deyi* v. *Chowdry Bhola-nath Thakoor*.—B. L. R. Vol. VII, p. 93; and S. W. R. Vol. XV, C. R. p. 63.

A widow is not competent to alienate property which she has purchased with the funds derived from her husband's estate after his death, and purchases with such funds would not belong to the widows otherwise than the lands from which the money arose belonged to them.—*Nihal Khan* and others v. *Hur Churn Laul.* Agra. Rep. Vol. I, A. C. p. 219.

A Hindú widow has no power to alienate part of the ancestral property to the injury of the reversioners. *Kunhya Lall Rooz* v. *Sheo Nath Dey* and another.—S. D. A. Rep. for 1859, page 1186.

CALCUTTA S. D. A.—*December 2nd,* 1819.

THAN SING and MAHAJEET SING, Appellants,
versus
MUSSUMMAT JEETOO, Respondent.

According to the Hidoo law, as current in Agra, a childless widow, after her husband's death, will succeed to the moiety of a village granted to him and his brother by the Rajah of the country, on a rent-free tenure; partition being presumed. She has only a life interest therein, and cannot alienate it. After her death it will go to her husband's heirs.

The respondent (originally plaintiff) instituted this action in the Zillah Court of Agra, on the 29th of April 1814, to recover from Ludja Ram, Bishen Doss, Than Sing and Mahajeet, brothers of her deceased husband, a moiety of the village of Nowgawah, situate in pergunna Sonk (formerly attached to pergunna Sonsa), held rent-free under a *sunnud* granted by Madhoo Rao Narain Scindia. She stated in her plaint, that the village in question was granted on a rent-free tenure to her husband, Bintee Ram, and his brother Bishen Dass, by Madhoo Rao Narain Scindia, under a *maafee sunnud,* in the year 1204, F. S., (A. D. 1796-97) in their joint names; and that Bintee Ram had possession thereof till it was attached by the officers of the Mahratta Government in the year 1856, Sumbut era (1206-7, F. S.), that he died in the following year, and the village remained

under attachment till she, having supplied Bishen Dass with money for his expenses, sent him to General Perron, the *aumil* of that part of the country under the Mahratta Government, who removed the attachment in the year 1860 of the *Sumbut* era (1210-11, F. S.), and delivered the village to them, on the same rent-free tenure: that she received a moiety of the profits thereof for the years 1861 and 1862, *Sumbut* era, (1211-12, and 1212-13, F. S.), that the defendants had unjustly dispossessed her, and refused to pay her the share of the profits, to which she was entitled in right of her deceased husband, she therefore instituted the present action.

Ludja Ram, the elder brother of the plaintiff's husband, did not appear to defend the suit. It appeared from the proceedings, that he had separated from the family during the life-time of his father, and a letter from him to the plaintiff was filed, wherein he acknowledged that the claim of the plaintiff was just.

Bishen Dass and Than Sing denied the right of the plaintiff to any share in the village. They admitted that the *sunnud* was granted in the joint names of Bintee Ram and Bishen Dass, but stated that the former never had possession thereof, he having executed a deed, whereby he relinquished the village to Than Sing, the *Poojaree*, or officiating priest, of the idol Sree Ram Chund Jeo, for the expences of the worship, &c., that the plaintiff had never received any part of the produce, and that when the village was attached by General Perron, Bishen Dass, without any pecuniary aid from the plaintiff, got the attachment removed.

Mahajeet resisted the claim on the same grounds, but denied the legality of the transfer of the village to Than Sing, *Poojaree*, and claimed to share therein as a joint family estate.

After perusing the pleadings and documents filed by the parties, and hearing the evidence of the witnesses, the Zillah Judge observed, that though the plaintiff had not proved that she ever had actual seizin of the village, she had established the fact of her having received part of the profits thereof, for the years 1861 and 1862, *Sumbut* era: he rejected the deed of transfer filed by Than Sing, as irregular in its execution, and not supported by credible evidence.

He considered the point at issue to be the right of the plaintiff to the property of her husband, under the Hindú law; to ascertain which, he put the following questions to the pundit of his Court.

One of five brothers, after the death of his father, obtains a grant of a village under a *maafee sunnud* in his own name and the name of one of his brothers. He dies, leaving four brothers and a widow. An answer, therefore, to the following questions is required: 1st, can all the brothers, or only those whose names are entered in the *sunnud*, claim the village? 2nd. Is the widow entitled to her husband's share, or is her right barred by the fact of her being childless?

The answers of the pundit were in the following terms: 1st, If a person, without aid of property left by his father, acquire real property, this property so acquired belongs solely to him, and not to his brothers. If any other co-operated with him in acquiring it, their shares are equal. 2nd, If the acquirer of real property die childless, even though he were at the time in family partnership with his brothers, his property will go to his widow, and not to his brothers. The widow cannot, however, alienate it by gift or sale: she will enjoy possession thereof during her lifetime, and after her death, it will go to her husband's heirs. The authorities for these answers are *Munoo* and *Yájnyavalkya*.

The defendants denied the correctness of the law, as laid down in these answers, and filed opinions (*Vyavasthás*) delivered by certain pundits in the city of Agra.

They prayed, therefore, that answers to the questions put to the law officer of the Zillah Court might be obtained from the law officer of the Provincial Court. In compliance with their prayer the questions were sent to the Provincial Court, by whom they were submitted to their pundit. His answers were as follow: 1st, If one or two persons acquire property by their own exertions, without aid from the family property, other brothers, though in family partnership, do not participate with them. If the property be acquired with aid from the family funds, the acquirer will take two shares, and the other brothers in equal proportions.

On consideration of the circumstances of the case, and the opinions of the pundits of the Zillah and Provincial Courts, the Zillah Judge was of opinion, that the plaintiff's claim was clear and

unobjectionable, and that no circumstances appeared to bar it. He therefore passed a judgment in her favour, on the 30th of September 1814, awarding to her possession of a moiety of the village in question, and making the costs payable by Bishen Dass and Than Sing.

These persons appealed from this decision to the Provincial Court.

The Fourth Judge of the Provincial Court considered the right of the respondent clearly established. He observed that it was proved that the respondent had received part of the profits of the village, as stated in her plaint; he rejectd the deed of transfer as improbable. He, therefore, passed a decree on the 5th of September 1815, confirming the Zillah decree and dismissing the appeal with costs payable by the appellants.

Than Sing and Mahajeet being dissatisfied with this decision, presented a petition to the Sudder Dewanny Adawlut accompanied by copies of the decrees passed by the lower Crourts, and of the *Vyavasthás* of the pundits of those Courts, and of the *Vyavasthás* filed by them in the Zillah Court.

Previously to deciding the case, the Court ordered that the *maafee sunnud* should be submitted to their pundits, with instructions to answer the following questions, and state the law thereon, according to the Mitákshará as received in the district of Agra.

In this *sunnud*, which is a *maafee sunnud* for a village, the names of Bintee Ram, the husband of the respondent, and Bishen Dass, his own brother, are entered; and it purports to grant the village to them and their heirs in perpetuity. Under the deed, both brothers had possession, and Bintee Ram dying, leaves the respondent his widow: under these circumstances, it is asked, whether a moiety of the village is the right of the respondent, during her life-time, or of Bishen Dass? and if Bishen Dass be entitled thereto, whether the respondent can claim from him food and raiment?

Their answer was in the following terms:—

If two brothers, Bramins, to whom the Rajah of the country has given a village as charity, and in order to perpetuate the gift, has granted a *sunnud*, have, under that *sunnud*, had possession of the village in equal shares, and one of them die childless, leaving a widow, that moiety of the village, of which he had possession,

will go to his widow, and not to his brother. For, from the circumstance of the two brothers having had possession each of a moiety of the village, a partition is presumed: and of the property, which falls to a husband on a partition, his widow is the first heir. Under the terms of the *sunnud*, the heirs of the donee will take the property. It is not customary to enter the names of females in such documents, men's names only being inserted. If the heirs generally are not meant, then the father and brothers cannot take; this would be contrary to the *shaster*, and the custom of the country. This *Vyavasthá* is agreeable to the Mitákshará and other law tracts current in Agra.

Authorities:—1st, *Yájnyavalkya,* cited in the Mitákshará and other tracts. "The property of a person who has no great-grandson (meaning neither son, grandson, nor great-grandson in the male line) will go to his wife; if he have no wife, his daughter, and in default of a daughter, daughter's sons, &c., will succeed thereto." 2nd, Mitákshará, "If a person, who has possession of divided properrty, and has not again joined his brothers, die, and leave no son, or grandson, his wife will take his property."

The Court (present J. Fendall and S. T. Goad) on considering this opinion, and the whole of the proceedings held in the case, saw no reason for altering the decisions of the Zillah and Provincial Courts. They therefore passed a final judgment, on the 2nd of December 1819, in favour of the respondent, awarding to her possession of a moiety of the village during her life-time, and declaring that she was not authorised to alienate it, and that on her death, the heirs of her deceased husband should succeed thereto. The costs were made payable by the appellants.—Sel. S. D. A. Rep. Vol. II, p. 320. (New Ed. p. 411).

In Tirhoot, a widow succeeding to her husband's estate has power to consume, or give, or sell, in her life-time, the movables, but has no power over the immovables beyond a moderate or legal enjoyment of them.—*Sree-naraen Rai* v. *Bhya Jha.* (17th July 1812. Sel. S. D. A. Rep. Vol. II, p. 23.) Cited in East's Notes, Case 124. *Vide* Morl. Dig. Vol. I, p. 312.

Those parts of the main decision of which the above is an abstract are as follow :—

The pundits of the Sudder Dewanny Adawlut were subsequently consulted (by the Suder Court) on the legal competency of Ranee Indrawuttee, to make a donation of the estate, movable and immovable, which devolved to her on the death of her husband, of the profits of that estate during her possession, and of any landed property purchased by her out of such profits: and it appeared, from the opinions which they delivered, that the widow was not competent to make a donation of any landed property, without the express consent in writing of her husband's heirs and relations; but that she might make a gift without their consent of movable property, of every description, excepting slaves; but that in all gifts it is made a condition, that half the husband's property be reserved for the due performance of his periodical obsequies.

The respondent having referred to an opinion of *Jaga-nátha,* (the compiler of the Digest of Hindú law,) in which it is declared, that the gift by a widow, of the immovable property left by her husband, though immoral and blamable, is not invalid; the pundits of the Sudder Dewanny Adawlut were called on to state, whether this opinion was supported by any and what books of the Mithila, Bengal, or Benares school. From the answer of the pundits, as well as from a variety of *Vyavasthás,* in other cases, it appeared that the gift of her husband's immovable property by a widow, without consent of heirs, or unless for special reasons set forth in the *Shasters,* was not only blamable, but invalid. The uniform decision of the Court, in other cases, had likewise disallowed such power of transfer by the widow.

The Court observed, that under the donation of the Ranee (if established), as alleged by Bhya Jha, and sworn to by his witnesses, Bhya Jha would be entitled to the whole of the personal property left by the Ranee, provided it did not amount to more than a moiety of the whole estate. The Court accordingly (present J. H. Harrington and J. Stuart), affirmed the decision of the Provincial Court.— Sel. S. D. A. Rep. Vol. II, p. 23. (New Ed. p. 29). See post pp. 281, 282.

By the (Hindú) law as current in the South, a widow, in a divided Hindú family, has no power to alienate the immovable

property inherited by her from her husband, except a small portion thereof for religious purposes; but she has absolute authority over the personal or movable property inherited by her from her husband to consume or dispose of it at her pleasure.—*Gopaula Putter and another* v. *Narrain Putter and others.*—*28th* of September 1850. Mad. S. A. Dec. p. 74.—Morl. Dig. N. S. p. 180.

See also *Coopa Tasyer* v. *Sashappier.*—Mad. S. R. Dec. for 1858, page 220.—Norton's Leading Cases, Part II, p. 648.

By the (Hindú) law as current in the South, a widow of a divided brother takes a life interest in the immovable property of her deceased husband; but she cannot dispose of it,—except with the consent of his heirs, or from pressing want to perform his funeral ceremonies. But she may dispose of his movable property.—*Rama-Sashien* v. *Akya-landummal.* 22nd of November 1849.—Mad. S. A. Dec. p. 115.—Morl. Dig. N. S. p. 180.

BOMBAY H. C.—*The* 21*st of September* 1863.

BECHAR BHAGVÁN, Appellant,

BÁI LAKSHMÍ, Respondent.

A Hindú widow's right to alienate movable property inherited from her husband, without the consent of his heirs, is absolute.

With respect to immovable property inherited from her husband, a Hindú widow is little more than a tenant for life, and trustee for the heirs of her husband, and she is restricted from alienating it by her sole independent act, unless for necessary subsistence, or for purposes beneficial to the deceased.

The appellant, plaintiff below, sued in the Court of the Munsif of Jambúsar, in the Broach District, to recover certain property, real and personal, in the possession of defendant, belonging originally to one Uká, the brother of the defendant, claiming under a deed of gift made to him after Uká's death by his widow, Prem, who was then seised of the property.

The appeal was argued before Forbes, Erskine, and Westropp, J. J.

Forbes, J.—Delivered judgment:—In this case we find that the widow, Prem, has sought to transfer by a deed of gift the whole

of the real and personal estate of her husband to the plaintiff, Bechar, without the consent of her husband's heirs, and that the claim of Bechar founded on this deed of gift is resisted by Lakshmí, the sister of Prem's deceased husband, on the ground that Prem exceeded her powers in so transferring her husband's estate.

We are of opinion that the Hindú law existing on this side of India gives a widow absolute power over the movable property of her deceased husband which has been inherited by her, but no power to alienate immovable property except under special circumstances. We, therefore, reverse the decree of the Lower Court as regards the movable property, and order that Bechar recover from Lakshmí the movable property claimed. *Decree amended.*—Bom. H. C. Rep. Vol. I, p. 56.

A widow in Western India has only a particular estate for life in the immovable separate property of her husband.—Bom. H. C. Rep. Vol. II, p. 11.

A Hindú widow succeeding to the immovable property of her deceased husband, and also claiming as heir to her only daughter, who died after her father, childless and unmarried, is only entitled during her life to a widow's estate. The doctrine laid down in the Division Court that ancestral property after partition can be disposed of by Will in the same way as self-acquired property, disapproved of, as opposed to the authorities and general spirit of Hindú Law.—*Laksmí-bái*, widow of *Krishna-náth Morobá* v. *Ganpat Morobá* and others.—Bom. H. C. R. Vol. V, p. 128.

A widow has no power to dispose by will of *immovable* property inherited by her from her husband. The word "inherited" used in the Mitákshará in regard to a woman's *strí-dhan*, does not include immovable property so as to make it her *peculium*, but refers only to personal property over which alone she has absolute dominion.—*Goburdhun Nath* v. *Onoop Roy and others.*—S. W. R. Vol. III, page 105.

That portion of the main decision of which the above is an abstract is as follows:—In the translation of the *Viváda Chintámani* lately made by Baboo Prosunno Coomar Tagore, we have a table of

succession from the Mitákshará and other works of authority on inheritance. In Section XI we find that "A widow *inheriting* her husband's property can enjoy it for life, but cannot sell or make a gift of it at her pleasure;" and again in Section XII, "Any property which a woman *inherits* is her *Strí-dhan,* that is, peculiar property. Hence, any property of her husband which she *inherits,* shall, on her death, be received by the heir of her peculiar property. But such property, cannot, according to the *Smriti-sára,* be her *Strí-dhan.* Hence, the heirs of her husband shall receive it." These passages appear at first to be contradictory, but at pp. 261 and 262 of the same work, we have some explanation, which helps to clear the difficulty, and it lays down the rule that a woman may dispose of *movable* property inherited from her husband, but not *immovable.* Section XII, moreover, as quoted above, merely describes the course of succession, but does not contradict the rule laid down in Section XI, that a widow cannot *make a gift of it.* All the schools, therefore, appear to concur in this point, as regards *immovable* property inherited by a widow from her husband, she has nothing but a life-interest and cannot dispose of it except under peculiar circumstances and under certain restrictions. We think, therefore, that the word "inherited" used in the Mitákshará, must be certainly limited to *personal* property, which a woman inherits, and does not extend to *immovable* property so as to extend to constitute her peculium."—S. W. R. Vol. III, pp. 107 & 108.

Remark.—Thus the meaning of the term "inherited" contained in the Mitákshará is interpreted in the above decision in conformity with the *Viváda-chintámani* which is a *Mithilá* authority (and according to which a widow has absolute power over her inherited movable property*), but *not* in conformity with the Mitákshará, which makes no distinction between the movable and immovable property inherited by a female, and according to the true purport of which her power of alienating either of them is restricted except under a legal necessity or with the consent of the reversionary heir. And a woman's inherited property, though it is in the Mitákshará etymologically or nominally called *Strí-dhan,* descends according to that very authority *not* to the heir of her real *Strí-dhan,* but to the heir of the last full owner who may be her husband, father, or son, as the

* See *ante,* pp. 272, 273, and post pp. 281, 282.

case may be. See Widow's succession in the main book; see also the Privy Council Decision in *Bhugwan Deen Dobey* v. *Myna Bibee.**

A childless widow, who is the nearest heir of her deceased husband, has, under the Mitákshará law, an absolute right over all the movable property left by him; and can alienate it to any one she pleases. A Government Promissary Note is not a corrody, or, consequently immovable property.—*Doorga Dayee* v. *Poorun Dayee.*—S. W. R. Vol. V, p. 141. Ind. Jur. Vol. I, p. 128.

By the Hindú law, as laid down in the Benares or Western Schools, although a widow may have power of disposing movable property inherited from her husband, which she has not under the law of Bengal, yet she is by both laws restricted from alienating any immovable property which she has so inherited; and on her death, the immovable property, and the movable, if she has not otherwise disposed of it, will pass to the next heirs of her deceased husband. There is no distinction with respect to such alienation between ancestral and acquired property.

The devolution of *Strí-dhan* or woman's peculiar property, from a childless widow, is regulated by the nature of her marriage. If her marriage was according to one of the four approved forms, at her death her husband's collateral heirs succeed to it.—*Mussummat Thakoor Dayee* v. *Rae Baluk Ram*—Privy Council, the 11th, 12th and 13th of December 1866.—Moore's India Appeals, Vol. XI, page 139.

Remark.—The erroneousness of the above three decisions, will be known not only by reference to the widow's succession in the main book, but also to the following decision of the Privy Council, which, being as it is in accordance with the Mitákshará, is the best and most correct on the point as respects Mitákshará school.

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* Post page 278.

PRIVY COUNCIL.—*The 2nd, 3rd and 6th of December,* 1867.

BHUGWAN-DEEN DOOBEY, Appellant, and
MYNA BIBEE Respondent.

On Appeal from the Sudder Dewanny Adawlut, North-Western Provinces, Agra.

By the Hindú law prevailing in *Benares* (the Western School) no part of the Husband's estate, movable or immovable, forms portion of his Widow's *Stri-dhun*, and she has no power to alienate the estate inherited from her husband, to the prejudice of *his* heirs, which, at her death, devolves on them.

The estate which two Hindú widows take in their husband's property is a joint estate.

Where a childless Hindú dies, leaving two widows surviving, they succeed by inheritance to their husband's property as one estate in co-parcenary, with a right of survivorship; and there can be no alienation or testamentary gift by one widow without the concurrence of the other.

One of the two widows died, having made a testamentary disposition whereby she gave a moiety of her husband's estate, which she had been put in possession of, to her father and brother. In a suit brought by the surviving widow to recover the moiety, *Held*, that the surviving widow was entitled to the share of the deceased widow.

The summary order made by a Judge under Act XIX, of 1841, not in a suit, but on an application for immediate possession, in consequence of differences having arisen in the family, giving possession in equal moieties, to two widows, although acquiesced in by the widows, by each taking possession of a moiety, does not amount to a partition of the estate.

If the Court below was wrong in its procedure, such miscarriage will not prevent the Judicial Committee from deciding the question, with respect to the power of disposition of the movables.

In this Appeal, the suit was brought in the Court of Principal Sudder Ameen of *Benares*, by the Respondent, as the sole surviving widow and heiress-at-law of *Rae Deena-nath*, a Hindú inhabitant of *Benares*, who had died childless, against the Appellant personally, and as guardian of his son, *Kaloo Ram*, a minor, to recover possession of a moiety of the self-acquired movable and immovable estate of *Rae Deena-nath*, which had been in possession of *Doola Baee*, then deceased, the other widow and co-heiress of *Rae Deena-nath*, and to set aside a testamentary disposition of *Doola Baee*, whereby she gave the moiety of the estate she was in possession of to the Appellant, *Bhugwan-deen Doobey*, her father, and *Kaloo Ram*, her brother; and also to render inoperative an order made in a mis-

cellaneous suit, under Act, No. XIX, of 1841, which upheld the possession of the Appellant in the moiety given by the Will of *Doola Baee.*

The question raised by the suit was, whether by the Western School of Hindú Law, prevalent in Benares, where the estate was situate, where there were two widows, co-heiresses-at-law and representatives of a deceased Hindú resident of *Benares*,each of whom had on his death succeeded separately and severally under an order made by a judge in a summary suit, pursuant to the Act No. XIX, of 1841, to moieties of his whole movable and immovable estate, either of them could in her life-time give by way of testamentary disposition, her moiety, or any portion of the movable or immoveable property included therein, to her blood-relations, to the exclusion of the surviving widow, or the heirs of their deceased husband who might be alive at the time of the surviving widow's decease.

The decree of the Principal Sudder Ameen (Mr. Robert H. Smith) determined this point in favor of the appellant, on the ground, that there had been a division declared and effected by a competent Court, namely, the judge of *Benares*, by his summary order for possession under Act No. XIX, of 1841, and such division having been acquiesced in by the Respondent, the estate of Rae Deena Nath thereby became a divided and separate estate, to a moiety of which *Doola Baee* succeeded exclusively as her own inheritance, and which she was competent to leave to whomsoever she pleased; and that the disposition so made by her to her father and brother was valid.

The *Sudder Dewanny Adawlut* at Agra consisting Messrs. Ross, Edwards, and Roberts, also held that the estate was so divided, but as the Hindú Law prevailing in *Benares* did not in this respect differ from that prevalent in the Province of Bengal, that *Doola Baee* was incompetent to make any testamentary disposition of the property which had been allotted to her under the summary order to the prejudice of the Respondent, who was her co-partner in respect thereof until such co-partnership had been dissolved. Hence this Appeal.

(The Judicial Committee of the Privy Council, after reviewing the discordant *Vyavasthás* or law opinions of many *Pundits*, proceeded.)

"It must, then, be taken upon the authorities to be settled law that under the law of *Benares* a Hindú widow has not the

power to dispose of immovable property inherited from her husband to the prejudice of his next heir; and the only question open to doubt is, whether she has any such power over movable property."

"It must be admitted that, in favor of this supposed distinction, there appears at first sight to be a considerable body of positive authority. In the case of *Cossi-nath Bysack* v. *Hurroosoondry Dossee*, the leading case upon the rights and disabilities of a Hindú widow in *Bengal*, it was at first supposed that the distinction was recognised even by that school. The first decree in that case declared the widow entitled to an interest for life in the immovable, and to an absolute interest in the movable, estate of her late husband. That was altered by the decree made on a bill of review, which declared her entitled to the real and personal estate of her husband, to be possessed, used, and enjoyed by her as a widow of a Hindú husband, dying without issue, in the manner prescribed by the Hindú law. On an appeal from that decree the whole subject was reviewed by *Lord Gifford*. His judgment (which is reported in the appendix to *Mr. Longueville Clark's* Rules and Orders,) whilst it establishes that, according to the law of *Bengal*, there is no distinction between movable and immovable property in respect to the widow's power of disposition over it, seems to proceed on the ground that the treatises known as the *Viváda-chintámani* and the *Ratnákara* are over-ruled and qualified in this respect by the *Dáya-bhága* and *Dáya-tatwa*, which give the law to Lower *Bengal*, and that where the two former treatises prevail, the distinction may exist.

"Of decided cases affirming the distinction, we have that in the High Court of *Bengal*, which was cited at the Bar from the Indian Jurist of the 31st of March, 1866, p. 128;* and which appears to be a case governed by the law of the *Mithila* school. We have further the four cases cited in the judgment in that case, of which two show that the distinction has been recognised by the Sudder Court of *Madras* as prevailing in the Presidency of Madras; and two show that it has also been recognised by the High Court of *Bombay* as prevailing in that Presidency.

"The Judges, indeed, of the High Court of Calcutta says, in the judgment just referred to, 'This case comes from *Tirhoot*, one

* Ante, p. 277.

of the Districts forming the ancient province of *Mithilá*, but the law is admittedly the same in this particular both for *Mithilá* and for the provinces governed by the Mitákshará. Their Lordships however, are not satisfied that this statement is correct.

The Mitákshará is no doubt accepted as a high authority by all the schools, even by that of *Bengal*, when it is not controlled by the *Dáya-bhága* and other treatises peculiar to that school. But the other four schools have, like that of *Bengal*, though in a less marked degree, their particular treatises and commentaries which control certain passages of the Mitakáshará, and give rise to the differences between those schools. In proof of this, it is only necessary to refer to the preliminary remarks of Sir William Macnaghten, pp. xxi to xxiii. From these it would appear that, whilst the *Mithilá* school follows implicitly the *Viváda-chintámani* and the *Ratnákara*, the south of India follows the *Smriti-chandriká* and the *Mádhavya*; and the Presidency of *Bombay* the *Vyavahára Mayúkha*. These works are by no means held in equal estimation at *Benares*.

Now, it appears from the judgment of Lord Gifford that the works which were supposed to go furthest towards establishing the distinction between movable and immovable property, which is now under consideration, were the *Viváda-chintámani* and the *Ratnákara*. These may well be taken to establish such a distinction according to the law of *Mithilá*, and yet fail to do so according to the law of *Benares*. Again, the *Mayúkha* is cited as an authority for the decision of the case, at p. 43 of the second volume of Macnaghten's Hindú Law. And, in the judgment under appeal, it is expressly stated that *that* treatise is not accepted as an authority by the *Benares* school; and, consequently, that the case in question was not binding on the Court. In like manner the law established by the two decisions at *Madras*, if it be so established, may depend on treatises and authorities peculiar to the South of *India*, and not accepted at *Benares*. From the reports of these, at p. 117 of the Sudder Decisions for 1849, and at p. 77 of the Sudder Decisions for 1850, it appears that both were decided on the *Bywastas* of *Pundits*. In the former case the authorities relied on by the *Pundits* are not given; but in the latter, mention is made of the Books called *Mádhavya* and *Saraswatí-vilása*, as well as of the *Mitákshará* (there

called *Vijnyáneswara);* and it appears, from Sir William Macnaghten's remarks, that the two latter works are of paramount authority in the territories dependent on the Government of *Madras*, whilst they are not enumerated amongst the works accepted at *Benares.*

If this be so, it follows that, even if the above-mentioned cases were correctly decided, they are by no means conclusive on the present question. The decision of the High Court of Calcutta in so far as it confirmed the title of the purchaser of the Government promissory notes, might have been rested on the general law relating to the transfer of negotiable papers; and that case, so far as it involved the question now under consideration, and the case in the second volume of *Moore's* Indian Appeal Cases, were determinable by the law of *Mithilá*. The two cases in the High Court of *Bombay*, were decided according to the peculiar law of the *Bombay* Presidency, including the *Mayúkha*; and those at *Madras* according to the law of that Presidency. None of them necessarily governs a case to be decided according to the law of *Benares*.

How, then, does the law stand independently of these decisions?

The startling differences of opinion amongst the *Pundits* show that the question cannot be taken to be clearly settled by the authorities accepted at Benares.

The text of the Mitákshará, on which, the Appellant must mainly rely, is the second paragraph of Section xi, of Chapter II, which includes 'property which she may have acquired by inheritance' in the enumeration of women's peculiar property. These words make no distinction between movable and immovable property: Sir William H. Macnaghten, indeed, ("Hindú Law," Vol. I, p. 38), excludes from *Stri-dhun* all the different kinds of property enumerated in the last clause of the paragraph in question.

On the other hand, it may be argued that the text is explicit; that it includes under the head of *Stri-dhun* all property inherited from the husband; that from the fact of its inclusion the power of disposition over it is *primâ facie* to be inferred; but that the right to alienate immovable property, whether inherited from the husband or given by him in his life-time, having been taken away by positive texts, the distinction in this respect between movable and immovable property has arisen.

This argument, however, would fail to show why immovable property, inherited from a husband, should not (and all the decided cases show it does not) descend as *Stri-dhun;* but passes, on the widow's death, to the next kin of the husband. The truth seems to be, that the texts which restrict a woman's power of disposition over immovable property given to her by her husband in his lifetime, are different from those which both restrict her power over immovable property inherited from her husband, and regulate the course of its devolution.

To the former class belongs the text of *Náreda:* "Property given to her by her husband through pure affection, she may enjoy at her pleasure after his death, or may give it away, except land or houses; and the text of *Kátyáyana:* "What a woman has received as a gift from her husband she may dispose of at pleasure after his death, if it be movable; but as long as he lives, let her preserve it with frugality, or else commit it to the family." To the second class belongs the text of *Kátyáyana,* on which the judgment under appeal so much proceeds, *viz.:* "The childless widow preserving inviolate the bed of her Lord, and strictly obedient to her spiritual parents, may frugally enjoy the estate or property until she die; after her the legal heirs shall take it." We take these texts as rendered by *Colebrooke,* Dig. Vol. III, p. 575 and p. 576.

The preponderance of authority is certainly in favour of the proposition that, whether the widow has or has not the power to dispose of inherited movables, they, as well as the immovable property, if not disposed of, pass on her death to the next heirs of the husband.

It is also worth remarking, that the doctrine—that property inherited from her husband forms part of a woman's *Stri-dhun*—receives no countenance from two of the treatises current in other schools which are supposed to recognize the widow's power to dispose of movables so inherited. Both the *Vivâda-chintámani* and the *Mayùkha* confine *Stri-dhun* within the definitions of *Menu* and *Kátyáyana.* They exclude property inherited, and the other acquisitions which are comprehended in the last clause of the paragraph in the Mitákshará.

They have distinct chapters for "the separate property of women," and "her right of succession to a husband who leaves no

son." The *Vivâda-chintâmani* expressly says (p. 262), that the text of *Kâtyâyana* does not refer to the peculiar property of a woman; and although it cites from *Kâtyâyana*, "Let a woman on the death of her husband enjoy her husband's property at her discretion," and explains "that this refers to property other than immovable," it also, at page 292, quotes from the *Mahâbhârata*, "For women the heritage of their husbands is pronounced applicable to use. Let not women on any account make waste of their husband's wealth," to which it adds, by way of explanation, "Here waste means sale and gift at their own choice." (See *Vivâda-chintâmani*, pp. 256 and 266, and *Mayúkha*, pp. 84 and 78.)

The reasons for the restrictions which the Hindú law imposes on the widow's dominion over her inheritance from her husband, are as applicable to personal property invested so as to yield an income, as they are to land. The more ancient texts importing the restrictions are general. It lies on those, who assert that movable property is not subject to the restrictions, to establish that exception to the generality of the rule.

The diversity of opinion amongst the *Benares Pundits* is sufficient to show, that the supposed distinction between movable and immovable property is anything but well established in that school. And the unanimous judgment of the five Judges of the Sudder Court, supported by the opinion of the *Court Pundits*, has, in this case, ruled that the distinction does not exist. Such a judgment ought not to be lightly over-ruled.

"Their Lordships, therefore, have come to the conclusion that, according to the Law of the *Benares* School, notwithstanding the ambiguous passage in the Mitâksharâ, no part of her husband's estate, whether movable or immovable, to which a Hindú woman succeeds by inheritance, forms part of her *Stri-dhun* or particular property; and that the text of *Kâtyâyana*, which is general in its terms, and of which the authority is undoubted, must be taken to determine—first, that her power of disposition over both is limited to certain purposes; and secondly, that, on her death, both pass to the next heir of her husband. It is unnecessary for them to express any opinion touching the correctness of those decisions.

Their Lordships have now to consider, whether the effect of so-called partition was to give *Doola Baee* any power of disposition over her share which she should not otherwise have had.

The so-called partition was between two widows, each having the limited interest of a Hindú widow in her husband's estate. It does not appear, that it was made at the suit or on the application of either. It was made by order of a judge who in the particular proceeding (one under Act No. XIX, of 1841), had no jurisdiction to determine questions of title; and who could only deal with the right to possession. It is difficult to see how such a partition could enlarge either widow's estate so as to give her a power of disposition which she would not otherwise have had against the next heirs of her husband.

The transaction seems to have been merely arrangement for separate possession and enjoyment leaving the title to each share unaffected. The acquiescence of the widows in the Judge's proceedings cannot have done more than bind each not to disturb the other's possession.

The estate of two widows, who take their husband's property by inheritance is one estate. The right of survivorship is so strong that the survivor takes the whole property to the exclusion even of the daughters of the deceased widow (2. W. H. Macnaghten's Hindú Law, p. 38, note 1). They, therefore, in the strictest sense, are coparceners, and between undivided parceners there can be no alienation by one without the consent of the other. And accordingly, this might have been decided in favor of the Respondent on this ground alone.*

Upon the whole, then, their Lordships are of opinion that the decree under appeal is substantially right and ought to be affirmed. Considering, however, that what has here been decided in respect of *Doola Baee's* interest, is equally applicable to that of the Respondent, and that as the latter is said to have assumed a power of disposing of her own share, they think it may be well to insert in the decree a declaration that the property recovered by the

* Not on this ground alone, since in that case it would follow that the surviving widow could alienate her share with the consent of the other widow, and thus the reversionary heir would be deprived of the inheritance which the law enjoins the widow or widows to reserve for him. The Hindú law does not allow a female to alienate her portion of the inheritance with the consent of her co-wife, but with the consent of the former owner's next or reversionary heir coupled with that of the co-wife, if any.

Respondent is to be possessed and enjoyed by her as a widow of a Hindú husband dying without issue, in the manner prescribed by the Hindú law. Their Lordships will humbly recommend Her Majesty, with that variation, to confirm the final decree of the Sudder Court of *Agra.*—Moore's India Appeals, Vol. XI, p. 487.

CALCUTTA H. C.—*The 23rd April,* 1868.

Present:

The Hon'ble A. G. Macpherson and F. A. Glover, *Judges.*

Regular Appeal from an order passed by the Principal Sudder Ameen of Patna.

PAUCHCOWREE MAHTON and others (Defendants,) Appellants,

versus

KALEE CHURN and others, (Plaintiffs,) Respondents.

A childless widow, under the Mitákshará Law, takes only a limited interest in her husband's estate, similar to that taken by a childless widow according to the law of the Bengal School.

Glover, J.—This was a suit by one Kalee Churn as next heir of his grandfather Junglee Sahoo to recover possession of certain real properties, by cancelling deeds of sale executed by his maternal grandmother Phool Dyee, the widow of Junglee, to the vendors of the various defendants, on the ground that, according to Hindú Law as prevailing in the provinces governed by the Mitákshará, she had no power to alienate, not being under legal necessity so to do.

Kalee Churn, the first plaintiff, sues along with four others, who are stated in the plaint to have purchased a large share in the property sued for in consideration of their providing the funds for carrying on the suit.

Junglee Sahoo died in 1838 (Pous 1245 B. S.), leaving a widow Phool Dayee, and two daughters, Bolakun and Mukkhun. Each of the daughters had a son, but Debee Pershad, one of them, is dead, and Kalee Churn, the plaintiff, is now the only survivor.

The Principal Sudder Ameen held that the Law of Champerty did not apply to this country; that the suit was not barred by the Statute of Limitation; and that Cally Churn was, as the only surviving grandson of Junglee, entitled to sue. On the merits he found that Phool Dyee was not justified by Hindú Law in making the alienations complained of, and that Kalee Churn had never consented to her doing so. He therefore decreed in the plaintiff's favor, and ordered the various deeds of sale and orders of the Civil Courts to be cancelled.

Against this decision all the Defendants appeal.

For the defendants it was argued that according to the *Mitákshará* Law, the estate taken by Phool Dyee was not a restricted estate such as that of a widow under the Hindú Law current in Bengal. It was contended generally that a widow under the law of the Mitákshará takes an absolute interest in her deceased husband's estate, and may dispose of it as she pleases, and, further, that at any rate in the property not proved to have come to her husband as ancestral property she takes an absolute interest. We, however, decline to hear any argument on these points, there being no sort of doubt that according to a long series of decisions of the courts of this country which are in accordance with decisions of the Privy Council, a childless widow under the Mitákshará Law takes only a limited interest in her husband's estate, similar to that taken by a widow under the law of the Bengal School.

The later decisions of this Court have not gone further than to express doubts as to the application of the doctrine of champerty to our Courts, but the result has practically been a regular following of the precedent of 1852.* As to whether the Sudder Court in that decision misunderstood the former cases that had been brought to their notice, I do not think it necessary to offer an opinion. It is sufficient that all those cases were referred to and examined, and that the judgment of the Full Bench of the Court was that champerty was not of itself illegal.

* This is to be found in the Sudder Dewanny Adawlut Reports for 1852, page 394, in the case of Kishen Lall Bhoomik *versus* Pearee Soondurry and others. It was passed by a Full Bench, consisting of five Judges, who after reviewing the older cases on the subject, decided that champerty was not *per se* illegal, but that every such arrangement must stand or fall according to the peculiar nature of its conditions.

It seems to me, therefore, to have been authoritatively ruled that between a plaintiff and defendant in this country, no question of champerty can arise, and as I am not prepared to dissent from that ruling, although I confess to have some doubts of its propriety, I must decide this issue against the appellants.

Macpherson, J.—I concur generally in this judgment.

S. W. R. Vol. IX, p. 490.

PRIVY COUNCIL.—*The 22nd of July* 1869.

Present:

Sir James W. Colvile, Sir Joseph Napier, Lord Justice Gifford, and Sir Lawrence Peel.

*On Appeal from the High Court at Calcutta.**

RAJ-LUKHEE DEBIA, *versus* GOCOOL CHUNDER CHOWDHRY.

A Hindû widow sold a portion of her husband's property under a deed of sale; upon the face of which there was a statement that the property was sold in order to liquidate the husband's debts. Held that, that statement was not sufficient of itself to prove that the property was sold for the purpose stated, but that it was on the party seeking to uphold the sale to prove by evidence that the property was sold for that purpose.

Held further that a transaction of this sort may become valid by the consent of all the husband's kindred who are likely to be interested in disputing it, or by such a concurrence of the members of the family as suffices to raise a presumption that the transaction was a fair one and justified by Hindû Law.

The mere attestation of a deed of sale by a relative does not necessarily import his concurrence.

The question raised by this appeal is whether the sale by two Hindû widows of part of the estate of their late husband, one Gooroo Pershaud Talookdar, to the respondent, can be upheld as valid?

The suit was brought to impeach this transaction by the appellant as the adoptive mother and guardian of one Mohesh Chunder. The fact of that adoption is not now in dispute, nor is it disputed

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* From the judgment of Steer and Seton Karr, J. J., dated the 10th of May 1864, in Regular Appeal No. 428 of 1861,—not reported.

that Mohesh Chunder was by virtue of it, at the time of the institution of the suit, the next heir to Gooroo Pershaud or to the sons of Gooroo Pershaud failing his widows or the survivor of them. Mohesh Chunder was still living at the date of the final decree which is the subject of the present appeal; but he afterwards died childless, and the appeal is brought by his adoptive mother, who, as such mother, is his heiress. There is a suggestion in the appellant's case that she has, under the authority given to her by her husband, made a second adoption, but inasmuch as the validity of that adoption is incapable of being discussed in this suit, their Lordships cannot take that into their consideration.

The validity of this transaction is sought to be upheld upon two grounds, first, upon the construction of the hibba-namah, or deed of gift (at page 37 of the record), which, it is contended, gave to the widows an absolute interest, subject to be divested in the event of their sons or either of their sons coming of age. If that construction were correct, there would, of course, be an end of the case, because the deed of the widows would be good against all the world. Their Lordships will, therefore, first dispose of that question.

Upon the best consideration which thier Lordships have been able to give to this document, they are of opinion that it provides only a species of trust for management, and that it does not interfere with the devolution of the estate, according to the ordinary law of succession, under the Hindoo Law.

That being their Lordships' view of the construction of the deed, it may be convenient here to consider what has been the course of the succession to the property. If the succession were not altered by the deed, then of course, upon the donor's death, the two sons became entitled to his estate. Those sons are shown to have survived him. Each is also shown to have died in the life-time of his mother, and to have died childless and under age. The consequence of that is, that on the death of each, his interest would have passed to his mother, and that Mohesh Chunder, who was the adopted son of the testator's nephew, became on his adoption the collateral heir of each son, subject to the interest of his mother. The result, of course, is that upon the death of the widow, Gouree Dabea, who is dead, Mohesh Chunder became entitled to a present interest in the property, which is the subject of this contention, unless it can be

shown that *that* property has been validly passed by the act of alienation which is the subject of the suit.

Their Lordships have next to consider whether treating this deed as one executed by women having only the limited interest of Hindú females in property which they take either from their husband or their sons, the transaction can be supported upon any of the grounds on which such a transaction is recognized as valid by the Hindú Law. The law upon the point is well ascertained and has been established by many cases.

Then, upon what grounds are we to treat this transaction as valid? The statement upon the face of the deed is, that the property was sold in order to liquidate the husband's debts.

The learned Judges, however, finally decided the case, partly upon the mere fact that Juggut Ram was an attesting witness and must therefore be taken to have been a concurring party to the transaction, and partly upon the corroboration which they seem to think that fact afforded by the evidence of Khadem Ally. Their Lordships cannot see how the one can be any corroboration of the other. The fact that Juggut Ram attested the deed is perfectly consistent with the fact that Khadem Ally is a tutored witness brought forward at the last moment to depose to having seen what he never saw.

Again, with respect to the effect of the attestation of the deed by Juggut Ram, it seems to their Lordships that the learned Judges have attached to that circumstance a weight which it really does not possess. Their Lordships do not mean to impugn those authorities which lay down that a transaction of this kind may become valid by the consent of the husband's kindred, but the kindred in such case must generally be understood to be all those who are likely to be interested in disputing the transaction. At all events, there should be such a concurrence of the members of the family a suffices to raise a presumption that the transaction was a fair one and one justified by Hindú Law.

And one of the difficulties of allowing the present decree stand is that this point, which was raised at the last moment, v decided upon the mere proof, by the production of the deed, t Juggut Ram was an attesting witness to it. The point had ne been raised before. The opposite party has had no opportunit

examining Juggut Ram as to the circumstances under which he became an attesting witness, or what his understanding of the transaction really was. The utmost that the Judges ought to have done in that state of things, was to remand the case to be re-tried for the full consideration of that question.

Their Lordships cannot affirm the proposition that the mere attestation of such an instrument by a relative necessarily imports concurrence. It might, no doubt, be shown by other evidence that when he became an attesting witness, he fully understood what the transaction was and that he was a concurring party to it, but from the mere subscription of his name that inference does not necessarily arise. But considering who Juggut Ram was, and what the circumstances of this family were, their Lordships are further of opinion that his concurrence would not in this case be sufficient to set up the deed. In the first place, it is not proved, though on the other hand it certainly is not disproved, that at the date of the execution of this deed, which was executed before the adoption took place, Juggut Ram was the next heir in reversion. He was unquestionably a very distant relation, and although he appears to have taken a considerable part in the management of this family, and in even the adoption of the plaintiff, he is not proved to have been the next heir. On the other hand, the very fact of his connection with the family leads to the presumption that he knew that the present appellant had the power given to her by her husband to adopt a child, and that therefore his interest, even if it existed, as next reversioner was in all probability likely to be defeated. Therefore, if his concurrence were proved, it would not amount to such a concurrence by the husband's kindred as, in the opinion of their Lordships, would have defeated the plaintiff's claim.

They think that the minutes should stand thus:—"Declare that the deed of the 16th of November 1845 was and is invalid as against Mohesh Chunder and the appellant as his heir, and declare that Mohesh Chunder became on the death of the widow Gouree Debea, and that the appellant, as such heir, is now entitled, in possession, to one moiety of the four annas, and order that the respondent do deliver up to the appellant such moiety, and do pay to her the profits thereof received since the death of Gouree Debea."

Their Lordships will therefore humbly advise Her Majesty to allow the present appeal, to reverse the decree of the Sudder Court, and to direct that, in lieu thereof, a decree be made to the effect above stated, and further to direct that the respondent do pay to the appellant the costs incurred by the plaintiff in both the Courts below. The appellant must also have the costs of this appeal.—S. W. R. Vol. XII, P. C., p. 47.

By the Hindú Law as current in the South, a widow of a divided brother takes a life interest in the immovable property of her deceased husband; but she cannot dispose of it except with the consent of his heirs, or from pressing want to perform his funeral ceremonies.—*Rama-sashien* v. *Akyalandummal.* Mad. S. D. A. Decis. for 1849 p. 115. *Vide* Morl. Dig. N. S. Vol. I, pp. 180—182.

A Hindú widow, who has inherited immovable property from her husband, though possessed of a limited power of alienating portions of such property for necessary purposes or spiritual uses, cannot dispose of by gift in *Dharm* or *Krishnarpan* of the whole of such immovable property without the consent of the heirs of her husband.—*Bhásker Trimbak Achárya,* Plaintiff v. *Muhadev Ramji* and others, Defendants.*—Bombay H. C. Rep. Vol. VI, p. 1.

The widow of a Hindú cannot alienate the estate of her deceased husband by a deed of gift without the consent of his heirs.—*Nund Kumar Rae* v. *Rajender Narain,*—Sel. S. D. A. Rep. Vol, I, p. 261 (New Ed. p. 349). *Vide* Morl. Dig. Vol. I, p. 281.

A Hindú widow holding only a life-estate in her husband's landed estate, cannot alienate it without the consent of her husband's heirs-at-law.—*Mussummat Bhowani Munee* v. *Mussummat Solukhna.* Sel. S. D. A. Rep. Vol. I, p. 322 (New Ed. p. 431).

The consent of all† the heirs living at the time of the execution of a bill of conveyance by a Hindú widow, either directly or by attestation is requisite to make the sale binding against the reversioners.—*Kartik Kurmokar* v. *Dhuno-monee Goopta.*—S. W. R. for 1864, p. 268.

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* This decision will be given *in extenso* among the Cases respecting sister's right of succession.

† See the Privy Council decision at page 288 *et seq.*

The fact of a reversioner being an attesting witness to a conveyance by a Hindú widow is an acquiescence on his part which precludes him from impeaching the sale on the ground of waste.*—*Gopaul Chunder Manna* v. *Gour-monee Dassee* and others.—S. W. R. Vol. VI, p. 52.

The reversionary heirs whose assent is requisite, are those whose interests are directly affected, and not those whose interest is merely inchoate and future.*—*Ram-dhun Bukshee* v. *Punchanun Bose.*—S. D. A. Rep., for 1853, p. 641.

A deed of alienation by a childless Hindú widow is only valid when made either with the consent of the immediate heirs* or under one of those exigencies which give a widow a power of sale.—*Sree-mutty Chunder Munee Dassee* v. *Joykissen Sircar.*—S. W. Rep. Vol. I, p. 107.

Consent of all* the heirs is necessary to make a sale by a childless Hindú widow valid in law, but the purchaser is entitled to hold the property during the widow's life-time. Only immediate reversioners are entitled to impeach a sale by a widow.—*Mussummat Radha* v. *Mussummat Koar.*—S. W. R., for 1864, p. 148.

A Hindú widow cannot, under any circumstances, alienate the whole landed estate devolved on her by the death of her husband, nor can she alienate a part, except under special circumstances, without the consent of all* the husband's heirs, notwithstanding she may have obtained the consent of the nearest heirs; and a deed of gift executed by her in favor of a stranger to be valid must be attested by all her husband's heirs, as consenting parties.—*Mohun Laul Khan* v. *Ranee Shiro-munee.*—Sel. S. D. A. Rep. Vol. II, p. 32 (New Ed. p. 40).

Remark.—The decision of the Privy Council in favor of the aforesaid Ranee was founded expressly on the ground that the deed then in question was executed without the concurrence of the descendants in the male line, who (though they were not heirs) were

* The reversionary heirs whose consent is necessary for the validity of an alienation made by a widow of her husband's property without a legal necessity have been determined by the Privy Council in the case of Raj-lukhee Debea v. Gocool Chunder Chowdhry (*ante* p. 288).—This determination appears to be in accordance with Hindu law and conclusive on the point.

guardians and protectors of the widow.—Vide *Ranee Sreemutty Debea* v. *Ranee Kund Lutta* and others.—Sutherland's P. C. Judgments, p. 182.

If a deed of sale executed by a Hindú widow be signed or attested by all the heirs living at the time of its execution, the consent of those heirs to the sale is to be presumed. This presumption is not conclusive, but may be rebutted by any party showing that his signature was there for some other purpose than that which the Hindú law presumes.

The signatures of the nearest heirs upon a deed of sale executed by a Hindú widow is insufficient to render the sale valid; those of all the heirs of the widow's husband living at the time of its execution, either are requisite, or their consent to the sale must be given in some other form.

Certain deeds of sale were in this case rejected by the Court as not having had the consent of all the heirs living at the time of their execution given to them; certain other deeds were declared valid inasmuch as the consent of all the parties, whose consent is requisite under the Hindú law, was given to the transfer.—*Hafeezun-nissa Begum* v. *Radha Benode Misser.*—S. D. A. Rep. for 1856, p. 595.

Vide—*Sheo Gholam Sahoo* v. *Jobráj Singh.**—S. D. A. Rep. for 1847, page 544;—also *Coopa Joseyar* v. *Sashappien.**—Mad. S. D. A. R. for 1858. page 220;—also *Ramabutten* v. *Mootoosamy Pillay.** —*Ibid.*, for 1856, p. 14;—also *Paroomaya* v. *Ram Chunder.**—Mad. S. R. for 1857, p. 1;—also *Gunput Singh* v. *Ranee Choukee.**—N. W. P. R. Rep. Vol. V, page 202;—also *Koshalee* v. *Mussummat Sibanee.**—N. W. P. Rep. for 1851, Case 191;— and also *Doorga Dutt Pandey* v. *Hubbeejeer Pandey.**—*Ibid.* for 1856, Case 26.

* Norton's Leading Cases, Part II, p. 626.

CALCUTTA H. C. A.—*The 13th of July*, 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

LALLA KUNDEE LALL and others (Defendants) Appellants,

versus

LALLA KALEE-PERSAUD and others (Plaintiffs) Respondents.

Where persons who are presumptively next heirs in succession to a widow, come into an arrangement by which she surrenders possession to them and receives a maintenance from them, such arrangement must be held to be binding as a family arrangement, and would not be altered by one or other of the reversioners dying during the life-time of the widow.

Couch C. J.—The material question in this case appears to us to be that which is raised in the second issue framed by the Moonsiff,—whether the father of the plaintiffs or the plaintiffs accepted the *ikrar-namah*, and accordingly held possession of the disputed property along with the defendants for a period upwards of ten years or not; because if it were so, the facts are that in the life-time of the widow, and after she had become entitled to succeed to the property, the persons who were presumptively the next in succession, and who, if she had then died, would have been entitled to divide it amongst them, came to an arrangement by which the widow, instead of continuing in possession, was to receive from them 24 rupees for her maintenance, and they were to take possession of the same shares as they would have had if she had then died.

That appears to us to be an arrangement which the family might come to, and which would not be altered by one or other of them dying in the life-time of the widow; and so the rights, when she died, being different from what they were when they made the arrangement. The agreement must be held to be binding as a family arrangement. It would be binding upon the father of the plaintiffs, and therefore is upon them who stand in his place. If in the form in which the case comes before us, we could give a finding upon that question, the suit might be disposed of now. But we have not authority to do so. And we cannot say that there has been any finding upon the question by the Lower Courts.

They have decided the case upon the law of limitation. Although the Judge may have used expressions which indicate what his opinion probably would have been, we cannot take them as a finding. We must send the case down to have a finding upon this issue, and when it is returned to us we will dispose of the appeal.—S. W. R. Vol. XXII, p. 307.

CALCUTTA S. C.—*The 21st of November,* 1856.

SRIMATI JADU-MANI DABI,
versus
SARODA-PROSANNO MOOKERJEA and others.

A conveyance for a good consideration by a Hindú female of her share in a joint family estate, inherited by her from her son, with the consent, and in favour, of the next heir then living, is a disposition permitted by Hindú law.

Khela-ram Mookerjea died intestate in the year 1817, possessed of considerable real and personal estate, and leaving two sons, Kali-prosanno Mookerjea and Boidyo-nath Mookerjea, and two widows, Srimati Droupodi Debi the mother of Kali-prosanno Mookerjea and Srimati Anando-moyi Debi the mother of Boidyo-nath Mookerjea. The two sons inherited the estate of Khela-ram Mookerjea and remained jointly possessed of it until the death of Boidyo-nath Mookerjea, who died in the year 1822, without issue, leaving an infant widow who died in the year 1830. Anando-moyi Debi then became the heiress of Boidyo-nath Mookerjea. On the 5th of March 1830, Anando-moyi Debi in consideration of a yearly allowance of Co's Rs. 4800 to be paid to her by Kali-prosanno Mookerjea, granted and assigned to him all her interest in the estate of Boidyo-nath Mookerjea, in the year 1843. Anando-moyi Debi went on a pilgrimage to Benares, where she lived till her death. Her allowance was regularly paid to her by Kali-prosanno Mookerjea so long as he lived, and by his representatives after his death. In February 1844, Kali-prosanno Mookerjea died leaving two infant sons—the defendant Saroda-prosanno Mookerjea and Tara prosanno Mookerjea, deceased; and two widows, the defendant Srimati Bimala Debi the mother of

the defendant Saroda-prosanno, and the defendant Srimati Shyama-sundari Debi the mother of Tara-prosanno. Kali-prosanno Mookerjea by his will, left his real and personal estate to Saroda-prosanno Mookerjea and Tara-prosanno Mookerjea jointly, with a gift over to the survivor of them, if either of them should die without male issue, and he appointed Srimati Bimala Debi and Srimati Shyama-sundari Debi his executrixes and Ashutosh Dey and Promatho-nath Dey his executors. The executrixes took possession of all the testator's property. On the 23rd of August 1849, Tara-prosanno Mookerjea died without issue, but leaving a widow, Srimati Jadu-mani Debi the plaintiff.

The plaintiff's case was, that Tara-prosanno Mookerjea having survived Anando-moyi Debi became entitled to a moiety of Boidyo-nath Mookerjea's estate, which on the death of Anando-moyi Debi devolved on the heirs then living, Sarada-prosanno and Tara-prosanno Mookerjea, and that the assignment by Srimati Anando-moyi Debi did not operate to give a divisible interest to Kali-prosanno in Boidyo-nath's moiety of the estate of Khela-ram Mookerjea; that the whole estate of Boidyo-nath Mookerjea was divisible into equal moieties, of which the defendant Saroda-prosanno Mookerjea was entitled to one moiety, and the plaintiff, as widow and heiress of Tara-prosanno Mookerjea, to the other.

Jackson, J.—Tara-prosanno Mookerjea having survived Anando-moyi, the plaintiff contends that he, as one of the heirs of Boidyo-nath living at her death, became entitled to a moiety of Boidyo-nath's estate. The defendant relies, however, on the deed of gift or surrender by Anando-moyi in favor of Kali-prosunno as taking the property out of the usual course of descent, and making it part of Kali-prosanno's estate, and subject to the limitations of his will. The validity of the deed is therefore the next subject for consideration:—

I think the argument for the defendant on this point is not supported to its full extent by authority, for although it is clear that on the occasion of a widow becoming a *byrághi*, the estate would at once descend to the nearest heirs living at the time, (2 Macnaghten's Hindú law, 131, 233, and the case of Hafeezun-nissa Begam *versus* Radha-binode Misser,)* yet there is no authority for the unqualified proposition that the widow can by her surrender vest the

* See *ante*, pp. 25 and 26.

whole estate indefeasibly in the nearest heirs living at the time of such surrender.

On a review of all the authorities, the correct view of the law would seem to be, that a widow's conveyance of the estate to all the nearest heirs living at the time of the conveyance is valid, provided that no other heirs of equal or superior degree happen to be in existence at the time of the widow's death. Mr. Colebrooke, in his note to the case of Mahoda *versus* Kalyani, lays it down thus:—"It has been declared by the law officers of the Court in other suits that a widow's gift of the estate to the next heir, is good in law, though she be restrained from making any other alienation of it. This opinion, though not founded on any express passages to that effect in books of authority, seems reasonable, as such a gift is a mere relinquishment of her temporary interest, in favor of the next heir. It may, however, happen that the person who would have been entitled to take the inheritance at her decease, might be different from the one who obtained it under gift or relinquishment to him as presumptive heir; and if the title of that person be either preferable or equal, it may invalidate such gift in whole or in part." This passage is inserted *verbatim* by Sir Francis Macnaghten, in his remarks on the case of Mahoda *versus* Kalyani (see page 309.) And we may therefore presume it was approved of by him. The case of Bijoya Debi *versus* Anna-poorna Debi is an illustration of this rule. In another recent case in the Sudder Adawlut, Rám-dhan Bakhshí *versus* Panchánan Bose, the Court held, that the nearest class of heirs could alone sue to set aside a deed executed by the widow, and that a suit by remoter relations for that purpose, whose interest were merely inchoate, could not be sustained.

The consent of the heirs is all that is required by the old authorities (see *Dáya-bhága*). If the true meaning of the word 'heirs' be all the persons living who might by possibility be heirs at the subsequent death of the widow, and it be meant that the consent of all these persons is necessary, the widow would seldom or never be able to convey, for among so large a class of heirs all of them would scarcely ever be competent or willing to consent. But I do not think that this is the correct meaning of the word 'heirs' and that the term is used in the old authorities to designate that class of persons only who would immediately succeed to the estate,

if the widow's interest were determined, rather than all the persons who might, by possibility, become heirs on the happening of that event.

On the whole, then, applying this view of the law to the facts of the case, I think that Kali-prosanno Mookerjea was the only nearest or next heir at the time of the execution of this deed, and that his consent to the gift in his own favor is clearly shown, and that although Tara-prosanno and Saroda-prosanno were the heirs living at the death of the widow, yet they were not heirs of superior, or, equal, but, on the contrary, of a remoter degree than Kali-prosanno, their father, and that therefore they cannot dispute the validity of the deed, which is valid according to Hindù law.

I would only in conclusion advert to one other argument. It was urged that the Hindú law does not give the Hindú widow any power of accelerating or altering the course of descent. This may be true as regards acts and conveyances by herself alone, but the observation is unfounded as regards acts done by the widow with the consent of the heirs, for such acts and conveyances are clearly within the contemplation of the law.

(Part of the judgment of Colvile C. J., is as follows :—)

In the case of Mohan-lall Khan *versus* Ranee Shiromani,* (also cited for the plaintiff) the gift was to a stranger, it was objectionable in its nature, it was not made with the consent of all the coheirs of the husband, or of his paternal relatives who, though more remote in the order of succession than his maternal kindred, were held entitled to control the widow's gift as her legal guardians and advisers.

The case before Mr. Braddon reported in the 6th, Sudder Dewanny Adawlut, p. 36,† is directly in favour of the proposition contended for by the Defendant. And the result therefore of the older decided cases is certainly not to show that the instrument in question was invalid in law.

There is a case on special appeal at page 457 of the Sudder decisions, for 1849 which, though very imperfectly reported, seems to imply the right of a widow to relinquish the inheritance, in consideration of maintenance, in favor of the next heir. Her power

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* *See Ante*, p. 293. † Post p. 300.

of [illegible] seems also to be assumed in a case reported in the [illegible] Decisions for 1856, p. [illegible]

The MS. case [illegible] versus [illegible] recognises two other propositions which are more or less in favor of the defendant in this case.—1st, that a widow may by adopting a certain form of [illegible] divest herself of the estate and thus accelerate its devolution on the next heir in her life-time.—2ndly, and this was ruled by the Court in [illegible] Dutt versus John Moore, that a consent to the widow's disposition given by a reversionary heir who afterwards dies in her life-time is binding on his immediate descendants. Such a rule seems to be reasonable and convenient, since otherwise every disposition by a widow would be in certain circumstances voidable.

Upon the whole it appears to me that, although the question is not free from doubt, the balance of the authorities is in favor of treating such a transaction as that which took place between Annund-moyi Debi and Kali-prosunno Mookerjea, as a disposition which the widow was, with the implied consent of Kali-prosunno, her husband's nearest heir, competent to enter into; at all events, as one which neither the sons of Kali-prosunno nor the representatives of those sons, are entitled to impeach. Such a conclusion, if justified by authority, is certainly one which is agreeable to reason. And if that conclusion be sound, it follows that on the case made by the bill, the plaintiff has neither any interest in the share of Boidyo-nath Mookerjea, nor any title of relief in this suit.

I entirely agree, however, with Mr. Justice Jackson in thinking that in the circumstances of this case the bill, though dismissed, should be dismissed without costs as against the principle defendants. The other defendants must have their costs.—Boulnois' Reports Vol. I, pp. 120—136.

A gift by a widow of the property derived from her husband to her daughter (the next in succession,) and her daughter's husband, a Brahmin, is valid, under the Hindú law, as current in Bengal.*—*Beer Inder Narain Chowdree* and *Muthoor Inder Narain Chowdree* v. *Suthhama Debea* and *Kishen Chunder Sandyal.*—Sel. S. D. A. Rep. Vol. VI, p. 36 (New Ed. p. 42.)

* In this respect there is no difference between the Hindú law as current in Bengal and that current elsewhere.

Where the transfer sought to be set aside was by the widow in favor of her daughter, who was lawful heir to the property,—*held* that, the plaintiff, a reversioner, has no present ground of action, as his reversionary right was not prejudiced thereby.—*Udhur Singh* v. *Mussummat Ranee Koonwar. Agra.*—Rep. Vol. I, A. C. p. 234.

Held, though strictly speaking, a Hindú widow has no legal power to execute a *hibah-bil-iwuz*, which is more in the nature of a sale than gift, still in the present case, which is a transaction between the (maternal) grandmother and her grandson, the Court consider the transaction in the light of a gift; and consequently it was quite competent to the grandmother, her own daughter or her grandson's mother not being alive, to transfer the property to her grandson, so as to accelerate his succession and to place him in a position at once to assert his right to his grandfather's estate.—*Guda-dhur Ghose* v. *Wooma Churn Ghose.*—S. D. A. Decis., for 1859, p. 156.

CALCUTTA, H. C. A.—*The 9th of September* 1864.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Puisne Judges.*

PROTAP CHUNDER ROY CHOWDRY, (one of the Defendants,) Appellant,

versus

SREEMUTTY JOY MONEE DEBEE CHOWDHRAIN and others, (Plaintiffs,) Respondents.

According to Hindú law, a widow in possession can relinquish, and, by relinquishing, anticipate for the reversioners their period of succession. A relinquishment in favor of second reversioners is also valid if made with the consent of the first reversioners.

One Chunder Sekhur had two sons, Doorga Churn and Parbutty Churn, Doorga Churn died childless, leaving a widow, Joy Doorga, who died in Jeit 1267. Parbutty had six sons, Komul Churn, Kali Churn, Gowree Churn, Rugghoo Churn, Oti Churn and Bowanee Churn. The two last sons died before their father, Komul Churn, and Gowree Churn died without heirs. Kali Churn died leaving only a widow, Joy Monee, plaintiff in the present case; and Rughoo Churn left a son, Protap, who is the principal defendant in it.

The plaintiff Joy Monee sues in her husband's right for one-fourth share of the 8 annas of the property belonging to her husband's father Parbutty Churn, and also in the same right for one-fourth of the 8 annas of the share of Doorga Churn, which share, by a deed of gift executed on the 7th Jeit 1223 had, with the consent of Parbutty Churn who was then living, been transferred to his sons, and possession taken by them under it.

The defendant, Protab, pleads that plaintiff is entitled to one-fourth of the 8 annas belonging to her husband's father, but that the deed of gift by Joy Doorga was not executed by her, but if executed, was null and void under Hindú law, and as she was a widow in possession and all the other members of the family predeceased her, he, as the nearest heir of Doorga Churn, is entitled to the whole of the property with the exception of the share belonging to plaintiff.

The lower Courts found that the deed of gift was executed by Joy Doorga with the consent of Parbutty Churn, that the four sons of the latter took possession under it, and that consequently plaintiff, as the wife of Kali Churn, is entitled not only to the share of Parbutty Churn which her husband enjoyed, but also to the same share in the property of Doorga Churn which had passed to her in his lifetime.

It is now contended on the part of the defendant in special appeal, that the deed of gift is in itself illegal; that to make it legal, it requires the consent of all the contingent reversioners then in existence; that even if it be looked upon as a relinquishment, it is illegal, for a widow having once taken possession cannot relinquish under Hindù law; that, consequently, the lower Court's judgment should be modified, and the suit of plaintiff, as to a share in Doorga Churn's share of the property, dismissed.

We think that it admits of no reasonable doubt, that under Hindú law, a Hindú lady in possession can relinquish, and by relinquishing anticipate for the reversioners their period of succession, and if she does this in favor of second reversioners (as in the present instance) with the consent of the first then or afterwards expressed, the relinquishment is valid, and this notwithstanding that it may be expressed in a form which under some circumstances might be open to question.

Under this view, we consider the relinquishment by Joy Doorga in favor of Parbutty Churn's sons with the consent of Parbutty Churn entirely legal, and as the property vested in those sons, the plaintiff, the wife of one of them, is entitled to the possession of the whole property of her husband, *i. e.* to one-fourth of the property of Doorga Churn, as well as the same share in that of Parbutty Churn.

There is then no ground for special appeal, and we reject the application with costs.—S. W. Rep. Vol. I, c. r. p. 98.

CALCUTTA, H. C. A.—*The* 26*th of November* 1867.

Present:

The Hon'ble L. S. Jackson and Dwarkanauth Mitter, *Judges.*

SHAMA SOONDUREE and another, (Defendants) Appellants,

versus

SHURUT CHUNDER DUTT and others, (Plaintiffs,) Respondents.

The cession of her right by a Hindú widow, during enjoyment, to the heir of her husband is valid; the recipient becoming absolutely entitled to the property which passes on his death to his heirs.

Jackson, J.—The decision of the Lower Court in this case is erroneous. That Court has held that although Shurut Chunder, during the life-time of Huro Soonduree, who was a Hindú widow in life enjoyment of the estate, obtained a decree as heir, on the strength of a deed of gift, of the estate, still this decree and gift can only stand good during the life-time of the childless widow, Huro Soonduree. And the decision goes on to say, that no gift or sale by a childless widow can remain valid subsequent to her decease, and that though Shurut Chunder was the heir of Huro Sooudnree's husband, still as he died during the life-time of that lady, his heirs can only hold and enjoy the disputed property under the above deed of gift and decree, so long as she lives, but that after her death they can have no right to it. Now, it appears that Shurut Chunder was, in fact, undisputably the heir of Huro Soonduree's husband, and therefore the reversioner. It has been repeatedly held by the

late Sudder and by this Court, that the cession of her right by a Hindû widow during enjoyment, to the heir of her husband, is valid. Among the latest cases upon this point is that given at page 241 of Marshall's Reports, the case of Rujoneekant Mitter.* That being so, and Shurut Chunder having received a surrender of the rights of the widow, entered into possession as heir of the husband and became absolutely entitled to the property, the interests of the widow being thereby extinguished. On his death, his heirs took the property, and the heirs of Huro Soonduree's husband have, therefore, no claim to it. The decision of the Lower Appellate Court must be overruled, and the special appeal allowed with costs.—S. W. Rep. Vol. VIII, c. r. p. 500.

CALCUTTA, H. C. A.—*The 29th of July*, 1874.

Present:

The Hon'ble Romesh Chunder Mitter, *Judge.*

GUNGA PERSAD KUR, (one of the Defendants,) Appellant

versus

SHAMBHOO NATH BURMUN and others, (Plaintiffs,) Respondents.

The succession of females, according to Hindu law, is not regular succession, and is not based upon the ordinary theory of spiritual benefit. Therefore, if they relinquish their rights in favor of the reversioner, the case is again brought back to the normal state of succession, the effect being to vest in him a complete title.

The facts out of which this special appeal arises are briefly these. One Abi-ram was admittedly the former owner of the properties which form the subject matter of this litigation. He died sometime before 1235, leaving him surviving Jusoda, his widow, Dullabha, his daughter, and Ram-nath and Shumbhoo-nath, sons of his daughter Dullabha. That after his death, Jusoda, with the consent of Dullabha, made a gift of these properties to her grandsons Shumbhoo-nath and Ram-nath. That on the 27th of Bysack 1235, 14 anna share in them was sold to the Defendant's ancestor by Ram-nath and Shumbhoo-nath. That subsequently on the 9th of Magh

* See Vyavasthá Darpana (2nd Ed.) p. 123.

1249, the remaining 2 anna share was similarly sold to the defendant's ancestor by Shumbhoo-nath and the widow of Ram-nath, who had died in the meantime. That subsequent to this, the remaining son of Dullabha, *viz.*, Shumbhoo-nath, also died, and last of all Dullabha herself dying in Assin 1274, the plaintiffs have become entitled to the properties in dispute by right of inheritance as heirs to the original owner Abi-ram. Upon these facts both the courts below have decreed the plaintiff's claim, with the exception of a small portion of a certain talook which has been held to have been lost to the plaintiffs, by the provisions of Section 2 of Act VIII, of 1859.

The defendants have preferred this special appeal, and the following grounds have been urged :—

1st.—That the Lower Courts should have dismissed the plaintiff's claim as barred by limitation.

2nd.—That, upon the facts found, the Lower Courts should have held that the gift by Jusoda with the consent of Dullabha created an absolute right in the disputed properties in her grandsons Ram-nath and Shumbhoo-nath.

3rd.—The sale by the daughter Dullabha conjointly with the reversionary heirs transferred the whole proprietary right, and the purchaser by such transfer acquired an absolute interest in the disputed properties.

The contention of the special appellant raised in the second ground of special appeal, which I shall consider first, seems to me to be valid. The arrangement by which the property in dispute was made over to Ram-nath and Shumbhoo-nath appears to be legally to amount to cession and relinquishment of their rights on the part of Jusoda and Dullabha in favor of reversionary heirs. The Lower Courts speak of it as a gift of the life estate of Jusoda, as if there was vested in some one else the remainder of that estate. I need hardly point out that this proceeds from an erroneous assumption that the widow's is mere life-estate. Therefore, the question to be determined is whether, according to Hindú Law, such cession and relinquishment of the widow's rights in favor of the reversioner operates to vest in the latter a complete title. Upon the authorities it is clear that it should be decided in favor of the reversioner. All the earlier cases upon the subject are collected in the case of Jadumoni Debea *versus* Saroda-prosunno Mookerjea (Boulnois' Reports,

page 121).* Although from an examination of them there might be some ground for contending that there was a slight conflict, yet an examination of the modern cases makes it quite clear that upon the authorities the question should be answered in the affirmative. (*Vide* page 627 Norton's Leading Cases, part II, where these cases are quoted). It seems to me also that this view is quite in accordance with the spirit and principles of Hindú Law. The succession of females according to Hiudú Law is quite exceptional, and is not founded upon the ordinary rule *viz.*, that of spiritual benefit. It is true that in the case of the widow, she confers some spiritual benefit, but if that were the sole test she would have ranked much lower than what she does now : daughters confer no benefit, but they succeed because their sons do. Thus it is evident that succession of females according to Hindú law is not regular succession, and is not based upon the ordinary theory of spiritual benefit. Therefore if they relinquish their rights in favor of the reversioner, the case is again brought back to the normal rule of succession. For these reasons I am of opinion that the effect of the arrangement by which Jusoda and Dullabha relinquished their right in favor of Ram-nath and Shumboo-nath was to vest in them at once a complete title as if they had taken the inheritance direct from Abi-ram. This being so, the plaintiff's claim must fall upon this ground of law.

In this view of the case it is not necessary to express any opinion upon the other grounds of appeal. Therefore the result is that the special appeal will be decreed, and the plaintiff's suit dismissed with costs in all the courts.—S. W. R. Vol. XXII, p. 393.

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* *Ante* page. 296.

CALCUTTA, H. C.—*The 26th of August* 1868.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

CHOWDHRY JUNME-JOY MULLICK, (Defendant,) Appellant,
versus
RAS-MOYEE DASSEE, (Plaintiff,) Respondent.

A Hindú widow has full right to alienate any portion of the estate in her possession, if the benefit of her husband's soul requires such a sacrifice, even though the act by which that benefit is to be secured is to be performed by a male member of the family.

Mitter, J.—This was a suit instituted by the plaintiff, now respondent before us, to recover possession of certain movable and immovable properties described in the plaint. The case set up by the plaintiff was, that the properties sued for by her were held and owned by her father, the late Gudha-dhur Roy; that on the demise of her father without male issue, his whole estate, real and personal, devolved upon her mother, Sreemuttee Doyee as his next heir and successor; that on the death of her mother which took place on the 19th of Bhadro 1273, the plaintiff as the only heir and representative of her father wanted to take possession of the estate, but that she was opposed by the defendants in the cause under color of various titles alleged to have been created in their favour by the said Sreemuttee Doyee. The cause of action was stated to have arisen on the 14th of May 1866, the date when this opposition was alleged to have been offered. The Principal Sudder Ameen of Midnapore, Baboo Nobin Kishen Paulit, has given a decree to the plaintiff in respect of a portion of her claim, and the present appeal has been accordingly preferred by the defendant Chowdhry Junme-joy Mullick.

With reference to the purchase made from the mother of the plaintiff, the appellant contends that she, the plaintiff, was a consenting party to the alienation; and further, that independently of such consent, there was a valid necessity to support it.

The appellant has shown by good and satisfactory evidence that the plaintiff's mother had occasion to defray the expences of the

srádh of her husband's mother; and that it was for the purpose of raising funds on account thereof that the sale in question was made.

The Principal Sudder Ameen entirely forgets the position which a Hindú widow occupies with reference to the estate of her deceased husband. This position is clearly laid down in the *Dáya-bhága*, page 182. "For women the heritage of their husbands is pronounced applicable to *use*. Let not women on any account make waste of their husbands' wealth." The word "waste" is expressly defined to mean "expenditure not *useful* to the owner of the property." It is clear, therefore, that the mother of the plaintiff had full right to alienate any portion of the estate in her possession, if the benefit of her husband's soul required such a sacrifice, even though the act by which that benefit was to be secured was to be actually performed by a male member of the family. It is a mistake to suppose that she holds the estate in trust for the benefit of the next heir of her husband, and such an heir has no right to contest the validity of an alienation that has been made for the spiritual welfare of the deceased owner himself. Now, the performance of the *srádh* of his mother was a matter of the utmost importance to the manes of the plaintiff's father;* and whoever might have performed it, the plaintiff's mother was fully justified in raising funds for such performance. The mother of the plaintiff, therefore, was bound in duty to raise funds for the *srádh*, whoever might have performed it; and by raising funds for this purpose she was *using*, and not wasting, the property within the meaning of the definition above pointed out.

All that the appellant was bound to show was that he had made reasonable enquiries about the existence of the alleged necessity, and that it was a necessity sanctioned by the Hindú law. The appellant has given ample evidence to prove this part of his case, and there is literally no evidence produced by the plaintiff to rebut it.—S. W. R. Vol. X, p. 309.

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* See *Ante*, page 122.

CALCUTTA, H. C. A.—*The 14th of June*, 1871.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges*.

Special Appeals from a decision passed by the Subordinate Judge of Gya.

Case No. 2691 of 1870.

LALLA GUNPUT LALL and others, (Plaintiffs,) Appellants,

versus

MUSSUMMAT TOORUN KOONWUR and others, (Defendants,) Respondents.

Case No. 2694 of 1870.

CHUMUN LALL, (one of the Defendants,) Appellant,

versus

LALLA GUNPUT LALL and others, (Plaintiffs,) Respondents.

The *srádh* of the widow's husband, the marriage of his daughter, the maintenance of his grandsons, and the payment of the husband's debts are admitted by Hindú law as legitimate grounds of necessity for alienations.*

Kemp. J.—The main ground and the ground upon which we think that we ought to remand the case is contained in ground No. 4, namely, "that the Lower Appellate Court seems to have erroneously held that there is no evidence of legal necessities, and the reasons assigned by it for invalidating your petitioner's deed of sale are wrong in law." The first Court, a Hindú Officer, in a very elaborate decision, found that the alienation by the widow was for pur-

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* In Kashi-nath Basak and another *versus* Hara-sundari Dasi and another, in the Privy Council, Lord Gifford, after reviewing the opinions of the different Pandits, observes as follows :—

"The result, as it appears to me, of these different opinions, is this : that they all agree, as I have already stated, that the widow Hara-sundari Dasi is entitled to absolute possession : that she has, for certain purposes, a clear authority to dispose of her husband's property; she may do it for religious purposes, including dowry to a daughter, and making gifts and donations to the husband's family; but they differ in this : the Court Pandits say that if she alienates the property for other purposes, without the consent of the husband's relations, it would be invalid; the others say that, though she would incur moral blame, if applied for purposes not allowed, yet the act would be valid as against the relations of the husband; in that respect the four pandits differ from the pandits of the Court, founding their opinion upon the doctrines contained in the *Ratnákara* and *Chintá-mani* which were not overruled by the *Dáya-bhága* and *Dáya-tattwa*." See *Vyavasthá Darpana* (2nd Ed.) pp. 97 and 149.

poses allowable by the Hindú Law. He finds that the *zur-i-peshgee* made by the husband of the widow, the common ancestor of the parties, Khoob Lall, was paid off by the widow; that the *srádh* of Khoob Lall was performed by her; that the marriage expenses of Bal Koonwur, daughter of Khoob Lall, were provided by the widow; that the maintenance of the other plaintiffs was also provided for by the widow as well as the marriage of their children; and that all the disbursements on the above accounts had to be provided for by loans raised by the widow from the defendants. He also found that the plaintiffs are living in commensality with the widow and are colluding with her in order to render her acts not binding upon them beyond her life-time. The first Court shows very distinctly that in the litigation which took place between the widow and the *ticca-dar*, Rewut Sahoo, the widow had to institute proceedings in the Fouzdary Court before she could get rid of the *ticcadar*; that these proceedings were appealed to the Sessions Judge, and that the widow did not get possession except on the footing that she was first to repay the amount of the *zur-i-peshgee* advanced by the *ticcadar*; then there was a suit in the Civil Court by the *ticcadar* against the widow, although that suit was dismissed; and he found also that the widow had herself to sue the *ticcadar* in the Civil Court, and that there were expenses incurred by the widow on that account, and although she got her costs in that suit still there were many expenses incurred in excess of the costs which the Court awarded to her.

This elaborate and careful decision of the first Court is disposed of by the Lower Appellate Court, a Mahomedan Officer, in as many words as there are pages in the first Court's decision.

The Subordinate Judge finds that because the widow got her costs in the litigation with the *ticcadar* awarded to her, it is absurd to say that she incurred any costs of her own in those suits. He also finds that any other necessity has not been proved because the Moonsiff had proceeded on imaginary grounds. We fail to see how the Moonsiff's grounds are imaginary, for he proceeds on grounds admitted by the Hindú law to be grounds of necessity for such alienations, namely, the *srádh* of the widow's husband, the marriage of his daughter, the maintenance of his grandsons, and the payments of the husband's debts. All these grounds are acknowledged by the

Hindú law as legitimate causes for raising money by a widow, and they have been found to be proved by the first Court.

The decision of the Subordinate Judge is so unsatisfactory that we take the case out of his hands and remand it to the Judge to be tried as an appeal from the Moonsiff's decision. Costs to follow the result.—S. W. R., Vol. XVI, p. 52.

Expenses incurred by the widow of a Hindú for the marriage of a daughter are recoverable from his estate.—*Preag-narain* v. *Ajodhya Persaud* and others.—Sel. S. D. A. Rep. Vol. VII, p. 513.

Hindú Law does not regard "pious purposes" as the only "necessary purposes" which justify alienation of inherited property by Hindú ladies. Self maintenance, discharge of just debts, protection or preservation of the estate, may be regarded as such "necessary purposes" also.—*Soorjoo Persaud* v. *Rajah Krishna Persaud Bahadoor Sahie.*—N. W. R. Vol. I, Part I, p. 49.

A widow may alienate houses and real property inherited from her husband, provided it be for paying his debts or defraying his funeral expenses, or for any other good and religious object, but always with the reservation of any rights possessed by any other persons in the same.—*Lukmee-ram* and others v. *Khooshalee* and another.—Borr. Rep. Vol. I, p. 412.—Morl. Dig. Vol. I, p. 285.

PRIVY COUNCIL.*—*The 11th and 12th of December*, 1867.

CAVALY VENCATA NARRAINAPAH, Appellant;

And the COLLECTOR OF MASULIPATAM, Respondent.

A, made advances to a Hindú widow in possession, which were secured by a mortgage on the immovable estate of her late husband, and the advances were applied by her to purposes for which she had power by the Hindú law to charge or alienate her Husband's estate, without his heirs' consent. Held, that A, was entitled as against the Crown, who took the estate by escheat on the death of the widow for want of heirs, to possession of the estate under the mortgage, as security for the amount advanced and interest, subject to the equity of redemption by the Crown.

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* Present:—Members of the Judicial *Committee.*—The Master of the Rolls (The Right Hon. Lord Romilly), the Right Hon. Sir James William Colvile, the Right Hon. Sir Edward Vaughan Williams, and the Right Hon. Sir Richard Torin Kinderaley. Assessor:—The Right Hon. Sir Lawrence Peel.

This is the third appeal to Her Majesty in Council in this unfortunate case. On the first it was determined that the Crown, which is represented by the Respondent, was entitled to the zemindary in question by escheat, subject to whatever interest the Appellant might have acquired therein by virtue of the transactions between his late father and *Veregondah Lutchmi-devammah*, the widow of the last zemindar. The order in Council made on the second appeal, which bore date the 6th of January, 1862, amongst other things, declared, that the Crown, taking by escheat, had the same right to impeach the alienation of the widow which the next heirs of the husband (if such there had been) would have had; and that the Appellant, then the Respondent, was entitled to a charge upon the estate, and to be paid and satisfied thereout, the full amount of all such of the advances (if any) made by his father to the widow, as were made for purposes for which, according to the Hindú law, she would have been entitled to alienate the estate against the next heirs of her husband, in so far as she had no other estate of her husband to answer such purposes,—and by the same order the cause was remitted to the Sudder Dewanny Adawlút of Madras.

The High Court sent down the issues so directed for trial in the Zillah Court. The judgment of the Civil Judge (Mr. Elliot) states very carefully the facts which he found to have been proved before him, and came to the following conclusions:—First, that the alienation by the widow was for legal purposes sanctioned by the Hindú law, and that the right of the Crown, as next heir of the husband, was, therefore, actually defeated by the *Razi-namah;* secondly, that the sums due for such advances amounted in April, 1838, to Rs. 48,614-13-6, the balance of the account then adjusted and settled; and thirdly, that the zemindar, the late husband of the widow, died possessed of no property available for any purpose, save and except the estate in dispute, which at his death was not unincumbered.

The decree of the High Court made on appeal from this judgment, declared that the right of the Crown to take by escheat was not defeated by the *Razi-namah;* that from the death of the zemindar in 1810 up to 1813 advances were made to the widow by the Appellant's father for purposes for which, according to the Hindú

law, the widow would have been entitled to charge or alienate the estate as against the next heirs of the husband.

Against this decree the present appeal has been brought; and their Lordships have now only to inquire what facts must be taken to have been proved on the trial of the issues directed by Her Majesty's Order in Council of the 6th of January, 1862, and what conclusions ought to be deduced from them.

That the zemindar, the husband of the widow, died in debt, and left little or nothing except the zemindary in question, is undisputed. It seems to be also admitted that the gross annual revenue of the zemindary was on the average, little, if at all, in excess of Rs. 10,000, that the Peishkush, or Government revenue, was upwards of Rs. 4,000, and that the balance was not much more than would cover the zemindary and other expenditure of the widow. The probability, therefore, of her getting out of debt, if she ever found herself in debt to a considerable amount, was exceedingly small.

Again, it is proved, that the pecuniary transactions between the late zemindar and the uncle and father of the Appellant (who were first cousins of his wife) began before the year 1804. If this be so, we have it established that in 1810, when the widow came into possession, her late husband was indebted to the Appellant's uncle, Kavali Seethiah, in a sum exceeding Rs. 20,000, and that she had to borrow from him a further sum amounting to about Rs. 3,200, in order to defray the expenses of her husband's obsequies, and perhaps also for other purposes. That the debt so due to Kavali Seethiah was transferred to the Respondent's father on the 15th of April, 1811, is proved by Exhibit, No. XVI.

The High Court has held, that the only other advance established to their satisfaction is that of Rs. 1,033-3-3, paid for Peishkush in 1828. And their Lordships will accept that finding as correct, though there is undoubtedly some evidence of other advances of the like nature.

The widow is shown to have succeeded to the zemindary, encumbered with debts which she had no means of discharging, except the income; that is admitted to have been in ordinary years little more than sufficient to pay the Government revenue, and provide for the expenses of her establishment and family.

They do not agree with the finding of the Zillah Judge, that the title of the Crown was absolutely defeated by the *Razi-namah* of the 5th April, 1841. They do not think that the Crown is bound by that document, or by the judgmeut of the 20th of March, 1839, on which it was founded.

The result is, that their Lordships must humbly recommend Her Majesty to reverse the decree of the High Court, and to declare, that on the 20th of April, 1838, there was due from the widow to the father of the Appellant in respect of advances for which she would have been entitled to alienate the estate, as against the next heirs of her husband, if such there had been, the sum of Rs. 48,611-13-6; that sum was duly charged upon the estate by the mortgage of the 20th of April, 1838; and that accordingly the Appellant is now entitled to hold the zemindary against the Crown as a security for so much of the said sum and of the interest thereon as now remains unpaid. This declaration is fatal to the Respondent's claim to immediate possession of the zemindary; but it will leave an equity of redemption in the Crown.—Moore's India Appeals, Vol. XI, p. 619.

Calcutta, S. D. A.—*The 15th of July,* 1847.

Mussummat Oma Chowdhurain and Gopi-nath Roy, Appellants,
versus
Mussummat Indra-Mani Chowdhurain and others.

A Hindú widow can alienate lands to pay her husband's debts without consent of heirs, and such sale even without possession is valid.

Plaintiffs declare that they succeeded in getting a decree against Subhaddra's husband Jiban-Krishna Babu, for Rupees 57,599-7-5, that after his demise she, in lieu of that debt, executed a bill of sale on the 17th Ashar 1249, and sold certain estates of her husband, which defendants, on the pretext of *benámi* deeds alleged to have been executed by Jiban-Krishna in their favor, withhold from plaintiffs, plaintiffs pray, therefore, for possession and *wasilat.*

In appeal, several pleas were urged for Appellants, of which the third is, that the sale to them, on which plaintiffs claim, is ille-

gal according to Hindú law; the widow, who sold to them, having no power to alienate property inherited from her husband. Fourth, the sale, with respect to the two properties in question, is illegal, because the seller was not in possession. Fifth, the decree for the amount of which the estates were sold, was collusive, and consequently the sale is invalid. Sixth, the sale and gift of Appellants were *boná fide* real transactions, and not fictitious, and therefore should be upheld.

On the part of respondents it was argued that, the sale having been made to pay her husband's debts, by the widow, was perfectly legal. The parties were Hindús, and according to the *Shástra*, a sale even without possession is valid. There was no collusion. The plaintiffs had obtained a decree against the widow's husband, which he appealed and died. The widow then withdrew the appeals and sold the estate to avoid heavier liabilities from continuing to contest the demand. And that the sale and gift of Appellants have been clearly fictitious and fraudulent to evade demands, and therefore were properly declared invalid by the Principal Sudder Ameen.

On the third plea, the following question was put to the *pandit* of the Court: 'Have Hindú widows the power to alienate the whole of the landed property inherited from their husbands, for payment of their husband's debts, without the consent of the next heirs to the said property, relatives of the husband?

To which the *pandit* answered: A Hindú woman, who has inherited the property left by her husband, may alienate the whole of it to pay his debts, because, so inheriting her husband's property, she is bound to pay his debts."

The *pandit* refers for his authority to *Nárada Muni,* as stated in the Digest of *Jagan-nátha,* and to be found in Colebrooke's translation, (pp. 315 and 316, volume I.) 'If the assets of the husband have been received by the wife, she must pay the debts.' And again: 'and so must a debt be paid by a childless widow, who has accepted the care of the assets, even though she have not accepted the burden of the debts, for she is successor to the estate.'*

The fourth plea is utterly untenable under the Hindú law, as is evident from the whole tenor of the law on rescission of sale, laid

* This however is not the translation of the text of Nárada Muni, but of Jagannátha's comment thereon. See Coleb. Dig. Vol. I pp. 315, 316.

down in the Digest of Jagan-nátha, especially the two texts of Nárada cited therein (pp. 317 and 318, volume II, Colebrooke's translation,) "when a vendible thing, sold for a just price, is not delivered to the purchaser, this is called non-delivery of a thing sold, a title of a judicial procedure." And again: "He then, who having sold vendible property for a just price, delivers it not to the buyer shall be compelled, if it be immovable, to pay for any subsequent damage, as the loss of a crop or the like; and, if movable, for the use and profits of it." Here are express penalties for non-delivery but not a word about invalidity on that account.

The fifth plea is one which cannot be adduced by Appellants, as they are not heirs, and cannot call in question the propriety and honesty of the acts of the widow.

The Court, therefore, deeming the claim of the Respondents valid, and the sale and gift of Appellants fictitious, dismiss the appeal with full costs, and affirm the decision of the Lower Court.—Sel. S. D. A. R. Vol. VII, p. 354.

CALCUTTA, S. D. A.—*The 21st of June*, 1848.

PREAG NARAIN, Appellant,

versus

AJODHYA-PERSAUD and others, Respondents.

The expenses incurred by the widow of a Hindú for the marriage of a daughter are recoverable from his estate.

This case, instituted by the Appellant in Zillah Patna on the second June 1843, was admitted to special appeal, on the 10th November 1846, under the following certificate recorded by Mr. Charles Tucker:—

'One Sanik Ram died leaving a widow, Juddo Bunsee Koonwur, and one unmarried daughter Parbuttee. The widow borrowed some money from the plaintiff to defray the expense attending the marriage of this daughter.

'On instituting a suit for the recovery of the amount against the widow and nephews of Sanik Ram, who succeeded to his estate,

the lower Courts refused to give a decree against the estate of Sanik Ram, but confined their award to the widow personally, and any property she might possess in her own right.

'The marriage of unmarried daughters is one of the objects for which the Hindú law allows a widow to alienate a portion of her deceased husband's estate; consequently, a debt contracted for this purpose, should be a charge on the estate of the deceased, and not on the widow personally. Special appeal admitted on these grounds.'

By the Court (Mr. Tucker, Sir R. Barlow, and Mr. Hawkins:)

With reference to what is set forth in the above certificate, we amend the decisions of both the lower Courts, and decree against the estate of Sanik Ram against which the Appellant is at liberty to take out execution in satisfaction of this decree.—Sel. S. D. A. Rep. Vol. VII, p. 513 (New Ed. p. 602).

By the Mitákshará law alienation without consent of heirs being unlawful but under necessity, a transfer by mortgage, made to clear off old debts and pay for a marriage, was held to have been under sufficient urgent case.—*Sheo Suhae Singh* and others v. *Gobind Roy* and others.—S. D. A. Decis. for 1859, p. 376.

Sale of a portion of her deceased husband's property by a Hindú widow, ostensively to pay his debts, and to defray other expenses for which the Hindú law permits alienation by a widow, upheld on proof as regards some of the debts—and on presumption as regards the others, that they were incurred by the husband,—and in the absence of proof, that the sale proceeds were otherwise appropriated.

The purchaser is not required to prove actual appropriation of the proceeds to the ostensible purpose.—*Baboo Hurrish Chunder Roy* v. *Nund Lall Dutt* and after his death *Gobind Chunder Dutt.*—S. D. A. Decis. for 1852, p. 259.

A sale by a Hindú for a just debt, made in conformity with the Hindú law, and with the consent of the reversioner may be valid, although the debt creating the necessity for the sale was a debt not of the ancestor's time, but of the widow's own contracting.—*Shoobhankuree Dossee* for self and as guardian of *Gopaul Chunder Bose*, minor, v. *Chand-monee Dossee* and others.—S. W. R. Vol. VII, p. 335.

A widow is liable under a decree for ancestral debts.—*Sitaram Dey* v. *Ranee Prosunno-moyee Debia.*—S. W. R. Vol. IV, p. 38.

MADRAS, H. C.—*The 27th of June* 1863.

NAMA-SIVÁYA CHETTI *versus* SIVA-GÁMI, and others.

The widow of an undivided Hindú has no right to sell his property for payment of his debts, even though it be self-acquired.*

Judgment:—This was a suit by the plaintiff as an undivided brother of the second defendant, and of the deceased husband of the first defendant, to recover two-thirds share of a house said to have been illegally sold by the first defendant to the third.

The lower Courts upheld the sale in question, and dismissed the plaintiff's claim, on the ground that the house was the self-acquired property of the first defendant's husband, and that the sale was made by the widow, the first defendant, for the purpose of paying her husband's debts.

We consider it clear that the ground on which the lower Courts have decided this case are untenable in point of law. The brothers being undivided, it is manifest that on the death of one of their number the widow had no right to deal with his property whether self-acquired or not;* and the sale is consequently invalid.—Mad. H. C. Rep. Vol. I, p. 374.

A widow has full power over the effects of her husband so long as she does not contract a second marriage. And where a widow had appropriated such property to the payment of the debts of her deceased husband, and to the expenses incidental to his funeral rites, through the instrumentality of the *mukaddams* or Patels of their cast, previously to her contracting a second marriage, and the heir of her deceased husband claiming the property from the Mukaddams, as reverting to him on her contracting a second marriage, was non-suited, as it was shown by them that the property had been legally applied as aforesaid by the directions of the widow, and it did not appear to have remained in their hands, or to have expended for their use. *Bhoola Khoosha* v. *Shiv-lall Kooher* and others.—Borr. Rep. Vol. II, p. 264. *Vide* Morl. (New Series) Dig. Vol. I, p. 285.

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* This decision seems to be opposed to the foregoing decisions, especially the Privy Council's Decision in Katama Natchear *v.* Rajah of Siva-gunga which is quite in accordance with Hindú law. See *ante* p. 244.

A sale by a Hindú widow of land inherited by her from her husband is valid only when made of necessity, and for certain purposes.—*Ranga-swamé Ayyangár* v. *Vanjulatámmál* and others.—Mad. H. C. R. Vol. I, p. 28.

CALCUTTA, S. D. A.—*The 7th of April*, 1859.

H. T. Raikes and A. Sconce Esq., *Judges*, and G. Lock Esq., *Officiating Judge.*

SREE NATH ROY (plaintiff) Appellant,
versus
RUTTUN-MALA CHOWDHRAIN and others (Defendants) Respondents.

This case was admitted to special appeal by Messrs. C. B. Trevor and H. V. Bayley.

The subject of this suit is the validity of a *talookdaree pottah* granted by the mother of plaintiff, a Hindú widow, before she had adopted the plaintiff.

Both the lower Courts affirmed the *pottah*, and dismissed the suit; and a special appeal having been admitted on two grounds, it was held with reference to the second, that the danger of losing the whole estate by a sale for arrears of revenue, and the limitted and encumbered resources of the widow, which together were held to justify the widow in seeking relief by the creation of the defendant's *talook*, furnish grounds of legal necessity within the contemplation of the law.

The plaintiff alleges that Unnopoorna, his adoptive mother, granted to the defendant a *Meerasee talookdaree pottah* dated 13th of Assaurh B. S., but that he now sues to set it aside as invalid under the Hindú law.

The Principal Sudder Ameen and the Judge have held that the transfer was valid under the Hindú law.

Raikes J.—The Judge's finding is, that the loan to the widow benefited the heir, who succeeded her, by saving the estate, and that the lease is valid, as no other resources are shown to have been available.

Elberling in his treatise on inheritance, has collated all the authorities on this subject, and at page 73, Section CLXV, he refers to them. "The widow is in her right as wife entitled to enjoy the

property of her deceased husband, and as heir is bound to apply it for his spiritual benefit. Generally she can not make gifts of or sell, or mortgage, the property, because, after her death, the property is to go to the next heir of her husband. When a sale or mortgage becomes necessary for any indispensable duty, religious or secular, or for her maintenance, it is valid, because duties must be performed, and she has a right to her maintenance out of the property."

Doubtless, for obvious reasons, the Hindú law could not specifically provide for a case of Government sale; but it is not consistent with Hindú law that the widow should passively allow the estate of her husband to be swept away, when the sacrifice of a small portion of it would preserve the greater part, and the act of sale or mortgage would apparently come within the line of seculiar duty imposed upon her, and render valid any such alienation independent of the precedent mismanagement which may have caused the necessity. If, then, the alienation be in proportion to the Government demand, and the lender be able to show that he used due caution in ascertaining the apparent truth of the representations made to him regarding the jeopardy of the estate, there seems nothing in the spirit of the Hindú law to prevent the recognition of his rights against the successors to the property.

As to the point that the defendant was bound to show that the adverse seasons, or some inevitable calamity, had exhausted the property and brought it to the hammer, as the only legal ground on which a charge of this nature on the property can be made valid under the Hindú law, I do not find *that* in the precedents quoted from any judicial ruling on the point; nor do they profess to give the precise authority under the Hindú law which inculcates this peculiar doctrine. I would rather say that no such general rule should be laid down, but that, when a mortgagee seeks to enforce his lien against property in the hands of the heir under circumstances like the present, he must prove that the representations which induced him to advance his money, disclosed such a state of facts as showed that the maintenance of the widow was dependent on the preservation of the estate, or that the performance of some duty enjoined by the Hindú law justified the alienation.

For the above reasons I decline to interfere with the Judge's decision, and would reject this special appeal, with costs.

Loch J. said :—" A Hindú widow, having the power to adopt, but not having adopted, sold part of the hereditary property to obtain funds to pay the Government revenue due from the estate, and thereby preserved it from public sale. She afterwards adopted the plaintiff, who now seeks to set aside the above sale on the ground that his adoptive mother, having, at the time of the sale, only a life-interest in the property, had no power to alienate; that a sale by a Hindú widow is only valid in cases of necessity prescribed by the Hindú law ; that the present was not such a necessity as justified the alienation.

The decision of the Privy Council, in the case of Hunooman Persaud Pandey, has materially altered the position of a mortgagee or vendee from a Hindú widow. It has relieved him from much responsibility, and only requires him to have acted in good faith, and to have been satisfied in the existence of an immediate necessity for the money at the time of his transaction with the widow. In the case quoted above, it is urged that the widow had adopted a son; but the mortgagee's or vendee's position and responsibility do not rest upon the position of the widow, but on the fact of a necessity then existing, and on his own good faith in the transaction. The chief point, therefore, to be looked to, in all those cases, appears to be the necessity under which the sale is alleged to have been made, and the conduct of the purchaser. The private sale or mortgage, by a widow, of part of an estate, to save the remainder from a revenue sale for arrears to Government, is an act not contemplated by the Hindú law; but it is admitted that, under certain circumstances the widow is justified in making such a sale. In the present case we find that the Judge considers that a necessity which rendered the sale justifiable did exist. From the evidence before him, he finds that the late proprietor died in embarrassed circumstances; that plaintiff, when he came of age, was, owing to his embarrassed circumstances, also obliged to contract a loan, showing thereby that the resources of the estate were insufficient for the support of the family, or had been diverted into other channels, such as the payment of debts. He finds that the danger to the estate by Government sale, which was advertised to take place on a date close at hand, was imminent; and that, owing to this private sale of a part of the property, the remainder of the estate was

saved, the arrears of Government revenue having been paid up from the purchase money obtained from the vendee. There is nothing illegal in this finding. I would therefore confirm the order of the Lower Court, and dismiss the appeal, with costs."

Mr. Sconce also affirmed the Lower Court's decision.

S. D. A. Rep. for 1859, p. 421.

CALCUTTA, H. C. A.—*The* 10*th of January,* 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble Dwarka-nauth Mitter, *Judge.*

PHOOL CHUND LALL (Defendant) Appellant,

versus

RUGHOO-BUNS SUHAYE (Plaintiff) Respondent.

In a suit by reversioners to set aside a deed of sale by a Hindú widow of part of her husband's estate on the ground that the money which it was necessary to raise could have been raised by other means; it was held that if the widow sold a larger portion of the estate than was necessary to raise the amount which the law authorized her to raise, the sale would not be absolutely void as against the reversioners, who could only set it aside by paying the amount which the widow was entitled to raise with interest.

Held also that, if a widow elects to sell when it would be more beneficial to mortgage, the sale cannot be set aside as against the purchaser if the widow and the purchaser are both acting honestly.

Peacock, C. J.—This is a suit brought by the plaintiff against the widow of Nursing Suhaye, deceased, who was a cousin of the plaintiff, the plaintiff and Nursing Suhaye being the sons of two brothers. Nursing having died without male issue, the plaintiff's claims under the Mitákshará Law to be the reversionary heir of Nursing upon the death of his widow, and the suit is brought for determination of right of inheritance by setting aside several deeds of sale by the widow of various parts of her deceased husband's estate, one of which is the subject matter of this appeal.

If there were any necessity, such as the Hindú Law warranted, for a sale of part of the property, and the widow sold a larger por-

tion of the estate than was necessary to raise the amount which the law authorized her to raise, it appears to me that the sale would not be absolutely void as against the reversioners, but that they could only set it aside upon paying that amount which the widow was entitled to raise with interest; and if the widow was not authorized to sell any part of the estate because it would have been more beneficial for the reversioners that she should raise the amount by mortgage instead of sale, I am of opinion that the reversioners could not set aside the deed of sale without placing the purchaser in the same position as that in which he would have been if the widow had mortgaged instead of selling.

The widow takes a widow's estate by inheritance from her husband. It is not absolute for all purposes, and it is not merely an estate for life; but she takes the estate of her husband for the benefit of her deceased husband, which includes her own maintenance and the performance of her religious duties, rather than for the benefit of those who may become the heirs of her husband upon her death. It is unnecessary in this case to determine whether in any case a widow is bound to mortgage. My impression is, that if a widow elects to sell when it would be more beneficial to mortgage, the sale could not be set aside as against the purchaser, if the widow and the purchaser are both acting honestly. It must be remarked that if a widow were bound to mortgage, the interest of the money raised by mortgage must be paid out of the estate, and thus the income of the widow would necessarily be reduced for the benefit of the reversionary heirs.

The plaintiff in this case brought his action in the life-time of the widow, and she was one of the defendants. The death of the widow pending the suit could not alter the nature and object of the suit itself, and, therefore, we must see what the plaintiff asked for as against the widow and the purchaser.

It is very unlikely that the plaintiffs, when they commenced this suit, would have been willing to pay to the purchaser out of their own pocket any amount which the widow might have been authorized to raise, because even if they did so, and the deeds were set aside, they would not have been entitled to the estate during the widow's life-time, and probably might never have been entitled to it at all; for it was only in the event of their surviving the widow that they would have

been entitled to the inheritance. They ask to determine the right of inheritance by setting aside the deeds, and they allege that those deeds were improperly executed, not because there was no necessity to raise any money, but because the money, which was requisite, could have been raised by other means.

If they had asked to have their own right of inheritance declared, they would have been premature, because it might happen that they would not survive the widow.

Under these circumstances, it appears to me that the only question for the consideration of the Court is, whether the deeds were absolutely void upon the ground that the widow ought to have raised the money, which was required, by other means than by selling a portion of the estate.

Now, it appears that, with regard to the deed now under consideration, a portion of the purchase money was raised for the purpose of paying Government revenue, a portion to pay off a debt incurred for the purpose of performing her husband's *Shradh*, a portion to pay off a debt contracted to defray the funeral ceremonies of her husband, and a portion to pay off a decree which had been obtained against her husband. It appears to me that the widow was not committing waste by selling a portion of the estate to raise those sums, and that the purchaser was justified in advancing his money upon the representations of the widow that she considered it necessary to raise those monies by selling, instead of raising the monies either upon the security of the estate by mortgage or in any other way.

I am of opinion that the widow was not bound to borrow the money by mortgaging the estate, and thus necessarily reducing the income to which she was entitled during her life-time for the maintenance of herself and her daughter, for the performance, if she thought necessary, of pilgrimage, and for other proper and necessary religious duties.

The suit is not brought to set aside the deeds upon putting the purchaser in the same position as that in which he would have been, if he had advanced the money upon a mortgage of the estate instead of paying it to the widow as the price of his purchase. If the decree of the Judge is right, and the deeds are to be absolutely set aside, and the heirs are to be entitled to take back the estate from

the purchaser because it has been sold instead of being mortgaged, then the reversionary heirs are entitled to benefit by an honest mistake of the widow (for no fraud is imputed to her,) in considering that it was better to sell than to mortgage.

We think that the decree of the Judge must be set aside, and the decree of the Lower Court dismissing the suit, must be affirmed. The Appellant will be entitled to the costs of this appeal, and to his costs in the Lower Appellate Court.—W. R. Vol. IX, page 107.

There is no rule of Hindú law which compels a widow alienating any portion of her husband's property to have recourse to a mortgage, instead of to a sale, to raise funds for her maintenance.* The question whether she has exceeded her powers or not, depends upon the necessities of the case.—*Nubo-koomar Haldar* v. *Bhabosundaree Dassee.*—B. L. Rep. Vol. III, A. C. 375.

A, a Hindú widow, sued for possession of an estate, and obtained a decree in her favor for a share of it, with a reservation that she was to have only a life interest in such share, without authority to sell any portion of it; the remainder of her claim being dismissed, she had to pay costs on that portion. A, wanting money partly for the purpose of paying these costs, and partly for her own use, sold the share to B. B, never got possession of the share, and sued C, and D, A's heirs, for the return of the purchase-money, understanding that A, was not empowered to sell the estate. The Court held, that the necessity of borrowing money on the part of A, was made out only so far as the costs of the former suit and a sum for her maintenance; and that as she borrowed a larger sum than was required, the sale was invalid, and the purchase-money became a debt due from A; but they considered B's claim to be good against C and D, only for that portion of the debt incurred by A, for the benefit of the estate and for her own maintenance, and decreed such portion accordingly with interest.—*Mussummat Wuzeerun* v. *Ragobind Rae* and another.—S. D. A. Decis. for 1846, p. 46.—Morl. Dig. N. S. Vol. I, pp. 180 & 181.

Sale by a Hindú widow of her husband's estate, under legal necessity, cannot be set aside upon payment of the amount which it was necessary for the widow to raise, or in the proportion which

* See however the *Dáya-bhága.*

that sum bears to the amount for which the estate was sold.—*Sugeerun Begum* v. *Juddoo-buns Suhaye* and others.—S. W. R. Vol. IX, page 284.

CALCUTTA, S. D. A.—*The* 1*st of February* 1826.

RAM-CHANDER SARMA *versus* GANGA-GOBIND BANERJEA.

Ganga-gobind Banerjea sued to recover possession of his deceased brother's estate, 7 annas of which were sold, and 9 annas were made over in gift by the deceased's widow. The Zilla Judge finding from the *Vyavasthá* submitted by the *pandit,* that the sale, made by the widow, of a 7 anna share of her late husband's estate was valid, but that the gift of the 9 anna share was illegal, passed a decree awarding to the plaintiff possession of the 9 anna portion, which defendant Ram-chander was directed to relinquish. This decree was affirmed by the Provincial Court. The Sudder Court held that the widow of a Hindú, who died without issue, has the power of making a gift of a portion (from one to three sixteenths) of her late husband's property for his spiritual benefit; but such not appearing to the Court to have been the object of the gift in the present instance, the claim of the donee was disallowed, and the Lower Court's judgment was affirmed.

The principal part of the *Vyavasthá,* given in the above case and according to which the case was decided, is as follows:—" A widow having succeeded to the property of her deceased husband has the power of alienating by sale *so much* of such property (and no more) as may be necessary for the payment of debts contracted by him, for her own subsistence, for the support of her husband's family, and for the performance of his exequial rites. She may likewise make a gift proportioned to the extent of her late husband's property for the benefit of his soul. And if these objects (*viz.,* payment of debts, expenses of *Srádha, &c.,*) cannot be effected without the sale of all the property she has the power of disposing of the whole of it. But she is not permitted to alienate by (gift or) sale the whole or even a part of the property *solely* at the suggestion of her own will or pleasure.—S. D. A. Rep. Vol. IV, p. 117 (New Ed.) page 147.

CALCUTTA, H. C. A.—*The 20th of September* 1869.

Present:

The Hon'ble W. Markby and F. A. Glover, *Judges.*

TARINEE CHURN GANGOOLY and others, (Plaintiffs) Appellants,
versus
WATSON & Co. (Defendants) Respondents.

Where a widow, who is under age, is properly represented in a suit, the matter stands precisely as if she were of age and acted on her own behalf: and as representative of the entire estate, involving the interests of her deceased husband and her minor son, she has the same control with respect to compromise as she has with respect to the assertion of rights and appeal against an adverse decision.*

Markby, J.—This was a suit brought to recover possession of a share of two zemindaries called Pergunnah Bogree and Turuf Behala, under the following circumstances:—

These zemindaries belonged to a family of Mookerjees. At some time prior to the year 1243, that family consisted of three brothers and three sisters, and on a partition the Bogree Pergunnah became vested in two of the brothers, Shumboo Chunder and Ram Narain, jointly, in equal shares, while Turuf Behala became vested in Shib Chunder alone. Shumboo Chunder died leaving a widow and several children, namely, Juggut Chunder, Pran Chunder, Mohesh Chunder, Hurish Chunder, Kalee Chunder, and Sreeman Chunder. Pran Chunder died in 1247, leaving a widow, Brohmo Moyee, and a daughter Dukhina who married the plaintiff Tarinee Churn Gangoolee, and by him had two sons Chinta Monee and Oma Monee. Oma Monee is dead and is represented by his father Tarinee Churn. Chinta Monee and Tarinee Churn are plaintiffs in this suit; and it is not disputed that by inheritance a 2 annas 13 gundas 1 cowree 1 krant share in the two zamindaries is vested in these two plaintiffs.

In the year 1246, the creditors under the decree obtained upon the loan to Ram Narain, attached and sold Ram Narain's share of the Bogree Pergunnah zemindaree, and the creditors themselves, amongst whom one was Pran Chunder, the father of Dukhina, became the purchasers of the property at the auction sale.

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* **The above abstract is not perfectly correct: see the main decision.**

In the year 1255 the purchasers at the execution sale brought a suit in the Mofussil against Messrs. Watsons and other persons, the object of which was to get rid of the *putnee pottah* granted by Ram Narain to Watsons and others on the ground that they were collusive transactions intended to defraud creditors and to get possession of the property.

The Principal Sudder Ameen (Mr. Mackay) who heard the suit, gave the plaintiffs a decree for possession of 8 annas of Bogree Pergunnah, declaring the pottahs to be invalid.

Messrs. Watsons appealed, and on the 27th Assar 1257 (10th July 1850) a compromise was entered into by Robert Watson for himself and as representing the estate of John Watson who had died during this litigation. The compromise is contained in two documents in the form of *pottah* and *kubooleut*. The *pottah* is granted by Juggut Chunder, Mohesh Chunder, and Sreeman Chunder on their own behalf; by Juggut Chunder and Mohesh Chunder "as guardians on behalf of Kalee Chunder Mookerjee, deceased, and Sreemutty Dukhina Debee," she being then a minor; by Mohesh Chunder as agent on behalf of the minor sons of his brother Hurrish Chunder; and by Sreemutty Soudaminee Debee, the mother of Kalee Chunder. The corresponding *kubooleut* is executed by Robert Watson "for self and as Administrator of John Watson."

The plaintiffs, Tarinee Churn and Chinta Monee, prior to this suit granted a *putnee talook* of all their share in the two Zemindaries to Luchmee-put Sing Roy, who joins in this as plaintiff.

It is admitted that by her subsequent acts Dukhina Debee so far recognized this conveyance as to make it binding on herself, but it is contended that it has no operation whatever upon the interests of Tarinee Churn and Chinta Monee whose interests cannot be alienated by the acts of the widow except under special circumstances of necessity, which here do not exist.

The argument is good if the view of the facts be correct, but we think the view is not correct. A great deal will depend on whether or no Dukhina Debee was properly represented in the suit before the Principal Sudder Ameen. If, as we think, we ought now to presume, she was properly represented, then we think the matter stands precisely as if Dukhina Debee had been of age and had acted on her own behalf, and we think it would be a wholly erroneous

view of the transaction to look upon it simply as an alienation by her of an interest of which she was in possession. We consider that both before and after the decree in the Principal Sudder Ameen's Court, she, and therefore those who represented her, had full power to compromise the suit.

If she had chosen never to assert her right, her children would have been barred by the statute of limitations (9 Weekly Reporter, 505, F. B.), surely then she could enter into a compromise before suit brought. If the decision of the Principal Sudder Ameen had been adverse, and Dukhina had not appealed, the decision would have been binding on her children (9 Moore's Indian Appeals, page 404).* Surely she could then have compromised. If the decision of the Principal Sudder Ameen had been reversed by the Sudder Court and she had not then appealed to the Privy Council, her children would have been equally bound, and in that case also she could clearly have compromised. It seems to us much more reasonable to hold that as representative of the entire estate in the litigation, she has the same control with respect to compromise as she has with respect to the assertion of rights and with respect to appeal against an adverse decision.

But even were we to suppose the compromise to be invalid, and that the Principal Sudder Ameen's decree stands, the decision of the Full Bench in 9 Weekly Reporter decides that no new cause of action accrues to the heir after the death of the widow: the only cause of action which ever existed has been asserted by the widow, and she obtained a decree thereon. The plaintiffs Tarinee Churn and Chinta Monee could therefore, at most, be entitled to execute that decree. This is not what they are now attempting to do; nor could they do so, for the same decision demonstrates that they would be barred here also.

Again, suppose that Dukhina was not properly represented in the litigation in the Court of the Principal Sudder Ameen. Those proceedings must then, so far as the present plaintiffs are concerned, be wiped altogether out of consideration, and how does the matter stand?—Precisely as the matter stood in the case before the Full Bench. The plaintiffs are heirs after a widow who had not asserted

* The Advocate-General *vs.* Ranee Surnomoyee, 1 W. R., 14.

her rights. More than 12 years have elapsed since their cause of action accrued, and they are therefore barred.—S. W. R. Vol. XII, c. r. p. 413.

A compromise by which a Hindú widow gives up all her rights in her husband's estate, reserving only a life-interest in a part of it, cannot but be regarded as an alienation, and is not binding against reversioners.—*Mussummat Indro Kooer* and others v. *Shaik Burkut* and others.—S. W. R. Vol. XIV, p. 146.

A reversioner is not bound by any compromise effected by the widow, and, therefore, limitation will not run against him from the date of the compromise, but of the death of the widow.

Calcutta High Court Decis. for 1862, p. 477.

Champerty—Alienation by a Hindú Widow.

A Hindú widow as the heiress of her husband sued his four surviving brothers, who retained the enjoyment of the whole joint estate, for the recovery of her share. While the suit was pending, on the 24th April 1859, she entered into an agreement with the defendant G., by which, after reciting the nature of her claim, and stating that she was too poor to prosecute it, she assigned to him all she might be entitled to receive from the joint-estate in right of her deceased husband, together with all interest and accumulations thereon, and all advantage to be derived from the suit about to be instituted by the defendant G., and she appointed him her attorney to institute and carry on any suit in her name for recovering her right and share in the property: it being agreed that he should retain one moiety of what might be recovered absolutely for his own benefit as remuneration, and out of the other moiety should repay himself such sums as he might from time to time have advanced or paid for her maintenance, with interest at 12 per cent. per annum, and also all such sums and costs as he might from time to time have advanced or been put to in carrying on the suits with 12 per cent. per annum, and should pay over the residue to the widow herself. Subsequently that suit was withdrawn.

In May 1859, the widow, by G., filed a fresh bill against her husband's surviving brothers for recovery of her husband's share in the estate together with accumulations; and in August 1861, obtained a decree for a large sum of money out of the joint estate,—"the whole to be enjoyed by her as a Hindú widow in the manner prescribed by Hindú law." By a deed dated November 14th 1860, G. assigned his interest under the assignment of April 1859, to H. S. the defendant.

In a suit brought on the 22nd February 1866, by the reversionary heirs of the husband in the Court of the Principal Sudder Ameen of Hooghly against the widow, G., and H. S., the last one of whom alone resided in Calcutta; which suit was on the 23rd of April 1866, removed into the High Court, on the application of G., and H. S.; it was prayed that the agreement of April 1859, and all sub-assignments that might have been made be set aside as void, and that the money should be paid into Court and kept there during the life of the widow defendant for the benefit of the reversionary heirs and in order to prevent waste.

Held, in appeal, by Peacock, C. J., and Macpherson, J.—That the suit could be maintained for the relief sought, and for the protection of the property.

That the deed of the 4th April 1859, so far as it relates to the moiety of the property assigned to the defendant G., absolutely, was not binding on the plaintiffs or on the persons who upon the death of the widow may succeed to the property of her deceased husband. Though not void on the ground of champerty it was an unconscionable bargain, and a speculative, if not a gambling, contract, and there was no necessity for such an alienation by the widow. But so far as regards the assignment of the moiety as security for the advances and expenses which G., or his assigns might reasonably and properly make or incur for the maintenance of the widow for carrying on the necessary proceedings to enforce her rights, with 12 per cent., interest on such advances, it is not void, but created a charge upon that moiety which was binding upon the reversionary heirs of the husband to the extent of such advances and expenses. There was legal necessity for such charge and it affected the moiety both of principal and accumulations.

Held, by Macpherson, J.—That accumulations are not the same as income, and cannot be dealt with by a Hindú widow as such; they should be treated in the same way as the corpus of the estate.

The agreement of April 1859 was void by English law as being a mere gambling transaction, and contrary to public policy and illegal.—*Grose* and another (Defendants) v. *Amirta-moyi Dasi* (Plaintiff).—B. L. Rep. Vol. IV, o. c., p. 1.

PRIVY COUNCIL.—*The* 10*th of July* 1840.

Present:

Lord Brougham, Mr. Justice Bosanquet, Sir H. Jenner, Dr. Lushington, and Sir E. H. East.

On Appeal from the Sudder Dewanny Adawlut of Bengal.

KEERUT SING, *versus* KOOLAHUL SING, and others.

A childless widow Ranee has no power to alienate her deceased husband's property as against his collateral heirs by a *wusseeyut-namah* or deed of gift.

Dr. Lushington.—This appeal is preferred against three decrees of the Court of Sudder Adawlut, bearing date the 19th of January 1825, confirming three decrees, made by the Provincial Court of Patna on the 19th of February 1823. The property involved in these suits appears to be very considerable, and on the death of the last possessor, the Ranee, the widow of Juswant Sing, became the subject of litigation, and gave rise to the three suits already mentioned.

It is not necessary to enter into the particulars of these suits further than to say that the respondents claimed in various proportions the whole property as heirs of the Rajah last in possession. The present appellant, Keerut Sing, claims this Zemindary upon several grounds: *first,* by virtue of a *wasseeyut-namah* or deed from the Ranee, the widow of the Rajah Juswant Sing, the last proprietor, who died in possession of the property. This deed bears date the 5th of July 1813, the Ranee having died herself on the 26th

of October 1818. *Secondly*, the Appellant alleges himself to be a relation of the late Rajah, though not, as was admitted at the bar, the nearest relative. *Thirdly*, he claims as in possession, denying that the respondents, the plaintiffs in the Court below, have made out their title. Both Courts have pronounced against his claim, and in favor of the respondents.

It may be expedient in the first instance to examine his title under the alleged deed; because, if the deed were validly executed by a person having legal authority so to dispose of the property, all other questions would be unnecessary; and in considering the title preferred under the deed, the power of the Ranee so to dispose of the property is obviously the first consideration; for if that question be deter mined in the negative, none can arise as to the execution.

Then, as to the power of the Ranee to dispose of the property, assuming Keerut Sing to be a near relation of her deceased husband; this question was put by the Court to the *pundits*, and answered decidedly in the negative; that will appear by the reference to the Appendix, folio 212.

There does not appear to be the least reason to doubt that this answer is a true exposition of the law which must govern the claims of all parties to the property. It is in comformity with the law, as laid down and acted upon in former cases.

This doctrine, too, is recognized by the Judge of the Provincial Court, Appendix, page 225, and also in his judgment of the 19th of February 1823; and this decree is affirmed by the Judge of the Sudder Dewanny Adawlut, on the 19th of January 1825, but without stating the law particularly.

As we are all of opinion that the law has been correctly laid down, and that the Ranee had no power to execute a deed of this tenor, all the title on behalf of the appellant, as founded on this deed, necessarily falls to the ground; and in this view all questions as to the execution of the deed require no consideration. But as a title, on the footing of possession, has been set up, we have not deemed it right wholly to pass by the question of execution.

Keerut Sing had been the Mookhtar or general Attorney of the deceased Ranee, and employed confidentially by her.

We think that there is no sufficient ground for holding that the appellant was a *bona fide* possessor by reason of this deed.

Under these circumstances, we intend to affirm the decrees of the Court below. There are, in point of fact, it may be said, three decrees of the inferior Court and three decrees of the superior Court; for all the suits seem to have been considered as one combined suit. Their Lordships think it right not only to affirm these decrees appealed from, but also with costs. They do not think it necessary to enter more particularly into the evidence, inasmuch as they affirm these decrees; but they are of opinion, looking at all the circumstances attending the taking possession of this property, and the manner in which the deed is alleged to have been obtained, that it is their duty to affirm the decrees with costs, and to discourage such attempts to take property from the right heirs by doubtful deeds of gift, and erroneous assertions of heirship.

Decrees affirmed with costs. Sutherland's Privy Council Judgments, pp. 96—98. Moor. Ind. app. Vol. II, p. 331.

Suit to declare invalid certain alienations of her husband's estate made by a Hindú widow, decreed by the lower Court, and decree affirmed in appeal on the merits of the case, there being no proof on the record to show that the alienation was made on account of the debts due by the widow's husband or for any other purpose sanctioned by Hindú law.—*Goberdhun Singh* v. *Sheo Sunker Singh.*—S. D. A. Decis. for 1857, p. 401.

Held, that no legal necessity was made out to admit of the childless Hindú widow in this case creating a *putnee talook* and appropriating the premium derived from assigning, in *putnee,* the property, in which she had but a restricted life interest.—*Mr. R Larmour, Manager of the Bengal Indigo Company* v. *Mussummat Tripoora Soonderee Dassee* and others.—S. D. A. Decis. for 1859, p. 567.

The burden of proving property (the subject of a gift by a Hindú widow) to be *stri-dhun* rests with those claiming under her. A deed of alienation by a childless Hindú widow of her late husband's property is not good against any one, unless made either with the consent of the immediate heirs, or under one of those exigencies which give a widow a power of sale.—*Sreemutty Chunder Monee Dossee* v. *Joy-kissen Sircar.*—S. W. R. Vol. I, p. 107.

Sales of property made by her for the payment of a Hindú widow's debts either arising fron litigation or other cause, or for the payment of the Government revenue, unless in this latter case the necessity for the estate arise from draught, or *other such cause*, are invalid under Hindú law, and especially in cases in which the widow has an ample maintenance.—*Hufeez-un-nessa Begum* v. *Radha Binode Misser.**—S. D. A. Rep. for 1856, p. 595.

A sale made by a widow to the prejudice of a son adopted by her under her late husband's authority is invalid, unless made under circumstances of inevitable necessity, even should the sale be made previously to the adoption.—*Ranee Kishen-munee* v. *Rajah Oodwunt Singh* and another.—Sel. S. D. A. Rep. Vol. III, p. 228.

CALCUTTA, H. C.—*The* 13*th of February* 1867.

Present.

The Hon'ble H. V. Bayley and Shumbhoo-nath Pundit, *Judges.*

RAJ CHUNDER DEB BISWAS (Plaintiff) Appellant,
versus
SHEESHOO RAM DEB and others (Defendants) Respondents.

According to Hindu Law, the *Srádh* of a mother is not a legal necessity, as that of the father is, to justify a sale by a daughter to the prejudice of the daughter's son.

Pundit J.—The special appellant represents the rights of a daughter's son.

The special Appellant further argues that, of the three necessities for sale by the daughter pleaded by the defendant, and founded by the lower Appellate Court in his favor as proved, one, *viz.*, the *Srádh* of the mother is not a legal necessity, as that of the father is, to justify the sale by the daughter to the prejudice of the daughter's son.

* This case is given *in extenso* in the *Vyavasthá Durpana* (2nd Ed.) p. 78.

We agree with the lower Appellate Court in its view of the Hindú Law. Accordingly we reject the Special Appeal.*—S. W. Rep. Vol. VII, p. 146.

CALCUTTA, H. C.—*The 2nd of December* 1864.

Present:

The Hon'ble C. Steer and E. Jackson, *Puisne Judges.*

HURO MOHUN AUDHIKAREE (Plaintiff) Appellant,
versus
SREE MUTTY AULUCK MONEE DOSSEE and others, (Defendants) Respondents.

A pilgrimage to Benares is not a legal necessity to justify a sale by a Hindú widow.

In this suit a sale by a Hindú widow has been set aside by the lower Appellate Court as made without legal necessity. It is said on special appeal that *that* necessity is apparent on the face of the deed of sale, and, on the Judge's judgment; the alleged necessity was the widow's maintenance, and to enable her to go to Benares. The Judge finds that the proceeds of the estate were sufficient for purposes of maintenance, and that there was no necessity for any pilgrimage to Benares. We quite agree with him, and dismiss this appeal with costs.—S. W. Rep. Vol. I, c. r. p. 252.

CALCUTTA, H. C.—*The 29th of August* 1864.

The Hon'ble Shumbhoo-nath Pundit and G, Campbell, *Puisne Judges.*

KARTICK CHUNDER CHUCKERBUTTY, (Defendant,) Appellant,
versus
GOUR MOHUN ROY, (Plaintiff,) Respondent.

A Hindú widow cannot endow an idol with her husband's property or a portion thereof to the detriment of the reversioners.

* Here by the word 'mother' is meant not the late owner's mother, but his daughter's mother, whose *srádh* expenses also ought to be defrayed from her husband's estate, as he himself was bound to perform her *srádh* in the event of her dying before him without a son.

In this case the question is whether a widow can endow an idol with her husband's property, or a portion thereof, to the detriment of the reversioners. Appellant, claiming to hold the property as custodian of the Idol, contends that such a dedication is for the benefit of the deceased husband's soul, and therefore valid under Hindú law. But we think that even under the Hindú Text Books he has failed to show any sufficient authority for his contention. He refers to Shama-churn's book, page 61, where we find a quotation to this effect: "For the purpose of raising her husband to a region of bliss, a wife may give away property left by him." But in another passage, quoted in the main text of the same page, we find "great benefit is done to a departed soul by paying his debts, by bestowing his daughter in marriage, and supporting his family: indeed if these duties be neglected, he is doomed to hell." Nothing is said of such a duty as endowing an Idol: from this we rather gather that the fulfilment of the moral and religious duties of the deceased are those by which he is to be raised to bliss, not a dedication by the widow of the nature of that under which the special appellant claims, which, under any circumstances, could only be supposed to conduce to the spiritual benefit of the widow herself,* (who made the gift without her husband's consent). We dismiss the appeal with costs.—S. W. R. Vol. I, c. r. p. 48.

CALCUTTA, S. D. A.—*The 5th of September*, 1842.

BUNGSEE DHUR HAJRA, Appellant,

versus

THAKOOR PYRAG SINGH, Respondent.

A Hindú female in possession of property inherited from her husband, in which she had a life-interest, contracted debts entirely personal, and for purposes of her own. *Held* that her husband's heirs, on whom the estate devolved at her death, are not responsible for *her* debts, which can be recovered, not from the property left by her husband, but only from her separate property.

The Plaint set forth that Mussummat Ruttun Koomaree Thakorain, Zemindar of Turuf Unwa, Pergunnah Bandra, borrowed from the plaintiff a sum of 376 Rupees, on execution of a bond, but died

* See, however, *ante*, p. 307 and the Main Book.

before repayment. After her death, her property devolved in succession to Sooruj-narain Singh and the respondent. The debt not having been repaid, the plaintiff sues the latter, who is now in possession of the estate.

The defendant replied, that his grandfather, Gopal Singh Thakoor, had two sons, *viz.*, Chunder-mohun Singh and Sooruj-narain Singh, the father of the defendant. Chunder-mohun, as the eldest son, inherited his father's estate, and, dying childless, was succeeded by his brother, Sooruj-narain. Mussummat Ruttun Koomaree Thakorain, the widow of Chunder-mohun, brought an action against Sooruj-narain for recovery of the estate left by her husband. A decree was passed which awarded to her possession of the property during her life-time, but without power to alienate it; and further provided, that on her death the estate should devolve on Sooruj-narain. On obtaining possession, Ruttun Koomaree made various attempts to alienate portions of the property. On this, the defendant's father presented a petition to the Judge of the Civil Court of Jungle Mehals, stating the fact, and praying that measures might be taken to protect his interests. This took place in 1243, two years before the date of the bond under which the plaintiff sues. A proclamation was issued strictly prohibiting any alienation of the property, except for payment of arrears of Government revenue. The plaintiff therefore can have no claims against the property in which Mussummat Ruttun Koomaree had only a life-interest, or against those who have succeeded to it as heirs to her husband. This was a personal debt incurred by Mussummat Ruttun Koomaree, and can be recovered only from her separate property.

The Principal Assistant (stationed at Manbhoom) dismissed the claim; and his decision, on appeal, was confirmed by the Agent to the Governor-General.

A special appeal was then admitted by the Sudder Dewanny Adawlut.

By the Court, Mr. A. Dick:—"The defendant is not the heir of Ruttun Koomaree, but of her husband; the debt was personal to her, and cannot be levied from the heirs of her husband, or from the property left by him. I would confirm the decrees of the Lower Courts; but, with reference to the admission of a special appeal in the case, wish for the opinion of another Judge."

Mr. Lee Warner referred to the pundit of the Court for an opinion as to whether, if a woman in possession of her husband's estate to borrow money, and on her death the property devolve on her husband's heirs, they are responsible for the debt incurred by her. The pundit replied that they are responsible if the money was borrowed for any purpose of the nature of that under which the woman was authorized by the law to alienate a portion of the property,—such as to pay her husband's debts, or perform his funeral obsequies,—but not otherwise. On the receipt of this opinion, Mr. Lee Warner, concurring with Mr. Dick that the debt incurred by Mussummat Ruttun Koomaree was entirely of a personal nature, and in no way connected with her husband, passed final orders confirming the decrees of the Lower Courts.—Sel. S. D. A. Rep. Vol. VII, p. 114 (New Ed. p. 133).

By the Hindú Law a widow is allowed, during her life-time, to make the fullest use of the usufruct of her husband's estate; but whatever part she leaves behind at her death becomes the property of the next heir of her deceased husband, and is not liable for her personal debts, unless such debts have been contracted under legal necessity for the benefit of the estate.—*Chundrabulee Debea (objector) Appellant,* v. *Mr. Brody (Decree-holder) Respondent.*—S. W. Rep. Vol. IX, p. 584.

Held that a personal decree against a widow does not bind her husband's estate. *Shah-zadah Mohummud Raheemoodeen* petitioner, *Ranee Prosunno-moyee Debea* opposite party.—S. D. A. Decis. for 1850, p. 358.

A decree against a widow in temporary possession for a debt arising out of her own neglect of duty, is not binding on all persons who take the estate in succession to her. A sale made in execution of such decree passes on more than the widow's personal interest.—*Brij Bhookun Lall Awastee* v. *Mohadeo Dobey.*—S. W. R. Vol. XVII, c. r., page 422.

A debt incurred on her *own* account by a widow of a member of a Hindú family, holding joint and undivided property, is not recoverable from the joint-estate, but from the widow personally, or from her separate property.—*Mussummat Sootee Koonwur* for self

and her minor son *Nund-kishore Singh*, Appellant v. *Punnoo Roy*, Respondent.—Sel. S. D. A. Rep. Vol. VI, p. 154, (New Ed. 185.)

CALCUTTA S. D. A.—*The* 18*th of December*, 1811.

HEM-CHAND MUJOOMDAR, Appellant,
versus
MUSSUMMAT TARA-MUNEE and MUSSUMMAT RAI-MUNEE,
Respondents.

S, the wife of B, deceased, executed a deed of relinquishment to H, acknowledging and confirming an alleged transfer by B, of his estate to H, in payment of a debt. Claim by T, and R, the mother and daughter of B, to possession of the estate during the life-time of S, disallowed, but it not appearing in proof that B had transferred his estate to H, or had died indebted to him, the deed ruled not to preclude the rights of the other heirs of B, after the death of S; * a wife not having the power, under the Hindú law, of alienating (except for special causes) the estate devolving to her on her husband's death.

This was an action brought by Mussummat Tara-munee against Hem-chand, the appellant, her deceased husband's nephew, for the recovery of a 9 ana share of Kismut Palara and other talookdary lands.

The Court of Sudder Dewanny Adawlut admitted the appeal, on consideration of the insufficiency of the proceedings of the Provincial Court; and the erroneous adjudgment of possession to Tara-munee, who was obviously not the legal heir of Bhyro-chand, his wife and daughter surviving.

Rai-munee (the daughter of Bhyro-chand) was, on her petition admitted as joint respondent with Tara-munee.

In answer to a reference by the Court, the Hindú law officers gave a *vyavasthá* to the following effect: "If the proprietor of a landed estate die, leaving a grandmother, mother, step-mother, wife, unmarried daughter, and son of his father's uncle, his wife succeeds to the sole possession of the estate; but she cannot, without sufficient

* Here for convenience's sake the initial letters used in the marginal note of the original, are, except B which formed the initial of Bhyro or Bhyrob, changed respectively into the initials of the names of the different parties; viz., A, is changed into S, C into H, D, in to T, and E, into R.

cause, or the consent of the above mentioned relations, transfer the property by gift or sale. The widow may transfer the real and personal estate of her deceased husband in discharge of his debts, if the amount of the debt exceed or equal the value of the estate, but if the value of the estate exceed the amount of the debt, the widow is only entitled to sell such part as may suffice to cover the debt. In order to render such sale by the widow valid, the debt must be proved by documentary evidence, or the testimony of witnesses; the declaration of the widow herself, whether she state that the debt was acknowledged by her husband, or merely herself acknowledge the justice of the debt, not being admissible. If, in the present case, the widow have transferred her deceased husband's estate in payment of his just debts and the creditor under such sale obtain possession of the estate, the other heirs of the deceased are not entitled to set aside the sale by payment of the debt: but if, on judicial investigation, it be proved that the value of the estate exceeded the amount of the debt, the Court may pass such decision as they judge equitable. Debts incurred by any member of a family living jointly, on account of any private concern, are exclusively demandable from that person, and his heirs, and not from the other members of the family; lastly, although the *la-davee* in question was not in itself sufficient to convey to the appellant the proprietary right in the lands, yet, if it were established by evidence (as stated in the document in question), that the husband of Sooruj-munnee had verbally made over his share of the joint estate to Hem-chand in payment of his debt, then Hem-chand is entitled to the lands in question, and his right thereto would not be precluded, although it should appear that the value of the lands in question exceeded the amount of the debt, in payment of which they were so transferred."

On consideration of the evidence taken on these points, the Court (present J. H. Harrington and J. Stuart) were of opinion, that there was no sufficient proof either of Bhyro-chand having incurred the debt on which the deed of relinquishment (*la-davee*) was grounded, or of his having, in his life-time, made over the lands in question to the appellant. A final decree was therefore passed, amending the decree of the Provincial Court, as far as it went to give possession to Tara-munee; and providing that, after the death of Sooruj-munee, the deed of relinquishment executed by her should

not operate to preclude the right of the other surviving heirs of Bhyro-chand.—Sel. S. D. A. R. Vol. I. p. 359 (New Ed. 481.)

The existence of a debt, the liquidation of which is provided by lease of ancestral property, is no justification for alienation of such property by a Hindú widow during her life tenancy.—*Tiluck Roy* and others v. *Phoolman Roy* and others.—S. W. R. Vol. VII, p. 450.

In the case of alienation by a Hindú widow, the mere fact that a sale *ishtehar* proved to have been issued about the time of transfer, is not evidence of necessity.—*Nand Coomar Mondol* and others v. *Gaetra Dossee* and others.—S. W. R. Vol. VI, p. 323.

The payment of a time-barred debt of her deceased husband is not a valid cause for the absolute alienation by a Hindú widow of her deceased husband's immovable estate.—*Milgirappa bin Sulbappa Teli* v. *Shivappa bin Erappa*.—Bom. H. C. Rept. Vol. VI, page, 270.

The consent of the then reversionary heir to a sale by a Hindú widow, though not binding evidence on the present heir, is strong presumption of the existence of necessity at the time of sale, to be rebutted only by proof of fraud or collusion, or of the absence of necessity.—*Kalee-mohun Deb Roy* v. *Dhununjoy Shaha* and others. S. W. R. Vol. VI, p. 51.

CALCUTTA High Court.

Present:

The Hon'ble SirBarnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble A. S. Raikes, H. V. Bayley, F. B. Kemp, and L. S. Jackson, *Puisne Judges*.

Cases No. 79, 84, 201, and 210 of 1862 and Nos. 78 and 84 of 1862.

Case No. 79.

Musst. GOBINDO-MANI DASI. (Plaintiff) Appellant,

versus

SHAM-LAL BASAK and others (Defendants) Respondents.

A conveyance by a Hindú widow for other than allowable causes, of property which has descended to her from her husband, is not an act of waste which destroys the widow's estate and vests the property in the reversionary heirs, and the conveyance is binding during the widow's life.

The reversionary heirs will not be precluded even during the life of the widow from commencing a suit to declare that the conveyance was executed for causes not allowable, and is, therefore, not binding beyond the widow's life, nor will the reversionary heirs be deprived, during the widow's life, of their remedy against the grantee to prevent waste or destruction of the property, whether movable or immovable.

The question, which was referred for the consideration of a full Bench in these appeals, is whether a conveyance by a Hindú widow of immovable property which she takes by descent from her husband, is valid during the widow's life, if the conveyance is made for causes other than those allowed by the Hindú law; and if not, whether the reversionary heirs of the husband can interfere by suit to cause the property to be delivered up to themselves or to the widow.

The case has been very fully and elaborately argued on both sides. The principal authorities on the subject are collected in the *Vyavasthá Darpana*, a very useful book upon Hindú law, by Baboo Shama-Churn Sircar.

Kátyána says:—

"Let the childless widow, preserving unsullied the bed of her lord and abiding with her venerable protector, enjoy the property, restraining herself until her death. After her, let the heirs take it." (Colebrooke's) *Dá, bhá* Chap. XI, Section I, para 56.

Again:—

"The widow is only to enjoy her husband's estate. She is not competent to make a gift, mortgage, or sale of it." (*Idem.*)

In Colebrooke's Digest, Vol. III, p. 465, it is said:—

"It fully appears that the widow's disposal of her husband's property at pleasure, otherwise than by the simple use of it or by donation for the benefit of the lord, is invalid."

Sir William Macnaghten, a very great authority, appears to have been of opinion that a gift or conveyance by a widow other than for allowable cause, was void, not only as against reversionary heirs of the husband, but also as against herself. (See Macnaghten's Hindú law, Vol. I, pages 19 & 20.)

In the case of *Doe dem.* Banerjea *versus* Banerjea, the plaintiff was non-suited. The decision turned upon another point and is no authority upon the question now under consideration, but it is important as containing the opinion which was delivered to East, C, J., by Macnaghten, J., drawn up by his son Sir William Macnaghten.

The opinion was as follows:—

"If a widow make a sale in perpetuity of her husband's landed property, by a deed to that effect, the purchaser, as she had no right to make the sale, will not be benefited by it, nor will he be entitled, in virtue of it, to the interest which the widow has in the estate. This is founded upon the principle of the sale being without ownership, which renders it void, *ab initio*, and not, as I before thought, upon the principle of a greater interest being conveyed by the deed than the widow was competent to grant. The *Pandits*, whom I have to-day consulted, agree in saying that, if one of four brothers make a deed of sale of the whole patrimonial property, it will hold good, as far as his share is concerned, because the sale creates ownership in the purchaser, and not the deed, which is only proof of the sale, and may be taken to prove it, as far as will serve that purpose, though invalid with respect to the conveyance of the property of the other brothers, it is valid against himself, and is proof of his intention. Not so in a deed made by a widow: she has no unlimited proprietary right over *any* part of her husband's property, but merely a general usufructuary right over the whole indiscriminately. It is clear, therefore, that she cannot convey the whole in perpetuity, but the deed by which she conveys is void, *ab-initio*, as to the sale: nor can it convey the interest which she possesses, which (independently of its not being transferable) is an interest of a totally different nature from that of proprietary right." (2nd Morley's Digest, p. 155.)

The opinion that the purchaser would not be entitled during the widow's life was founded upon the principle, that she had no proprietary right over any part of her husband's property, but merely a general usufructuary right over the whole indiscriminately, and that the sale being without ownership was void, *ab-initio*, by the Hindú law. The opinion of Sir William Macnaghten was founded upon the same principle, upon which he also gave his opinion, in the

same case that sale of a father's property by a son during the father's lime-time was void, *ab-initio*, upon the ground that it was a sale without ownership and was therefore not binding, after the father's death, upon the son, who succeeded to the property as his father's heir. Sir William Macnaghten appears to have considered that the widow had no greater right in an estate which she takes by descent from her husband, than a son has in the estate of his father during his father's life-time.

This, however, is not the case. In *Golack-mani Debea* versus *Digamber Dey* (Sup. November 15th, 1852,) the Court said:—

"No part of the entire interest, when the widow takes by inheritance, is in suspense or abeyance in any way, nor is there a reversion on a life estate, but the whole interest is in the widow. When she takes as heir under the Hindú law, she is ranked in all treaties a heir. Sir Francis Macnaghten treats her estate rightly as anomalous, and other writers treat it as coming to her as heir; therefore, when they term it also a life estate, they mean that expression in a sense different from that of a pure and mere life estate." (Macpherson on Mortgages, 3rd Edition, page 25.)

The Court goes on to say:—

"It has been invariably considered for many years that the widow fully represents the estate; and it is also the settled law, that adverse possession which bars her, bars the heir also after her, which would not be the case if she were a mere tenant for life as known to the English law," (*Idem.* p. 27.)

See also the case of *Káshí-náth Basák* and another versus *Hara-sundarí Dásí* and another, in the Privy Council, 24th June, 1826, (Clerke's Reports, p. 91, and Montriou's Cases of Hindú law, p. 495) from which it would seem that the widow takes more than a life estate. See also *Jádu-mani Debí* versus *Sárodá-prasanna Mookerjea* (1 Boulnois' Reports, p. 129; Macpherson on Mortgages, 3rd Edition, p. 28.)

In 6 Moore's Indian Appeals, p. 433, *Hari-dás Dutt* versus *Srimati Apúrva Dási,* it was held that the title of a widow to her husband's property, though a restricted one, was not in the nature of a trust.

There are some decisions in the Sudder Court in which it has been held that the conveyance does not operate as against the widow during her life-time. There are others in which the conveyance has been allowed to operate against her during her life-time.

In *Hem-chander Mozumdár* versus *Tárá-mani* (18th December, 1811, S. D. A. Report, Vol. I, page 359,*) it was declared by the decree that a deed executed by the widow should not, after her death, operate to preclude the right of the surviving heirs, leaving it to operate during her life-time.

In *Krishna-gobinda Sen* versus *Gangá-nárayan Sircar*, the Supreme Court declared a decided opinion that a widow had no right, other than for allowable causes, to make any grant of her interest in the estate which could endure beyond her own life. (Sir F. Macnaghten's Cons. Hindú law, page 19.)

In the case of *Rámánanda Mukhopádhyá* versus *Ram-krishna Dutt* (*Idem*, pages 19 and 20,) it was admitted by all the Judges of the Supreme Court that the grant which was made by a widow of property inherited from her husband, and which, it clearly appeared, was not made for benefit of her husband's soul, was good for her life.

In *Káshi-náth Basák* and another versus *Hara-sundarí Dásí* and another, in the Privy Council, to which we have already referred, Lord Gifford, after reviewing the opinions of the different *Pandits*, observes:—

"The result, as it appears to me, of these different opinions, is this: that they all agree, as I have already stated, that the widow Hara-sundarí Dásí is entitled to absolute possession; that she has, for certain purposes, a clear authority to dispose of her husband's property; she may do it for religious purposes, including dowry to a daughter, and making gifts and donations to the husband's family; but they differ in this: the Court *Pandits* say that if she alienates the property for other purposes, without the consent of the husband's relations, it would be invalid; the others say that, though she would incur moral blame, if applied for purposes not allowed, yet the act would be valid as against the relations of the husband; in that respect the four *pandits* differ from the *pandits* of the Court, founding

* *Ante*, page 340.

their opinion upon the doctrines contained in the *Ratná-kara* and *Chintá-mani* which were not overruled by the *Dáya-bhága* and *Dáya-tattwa.*" (*Vyavasthá Darpana* page 133. First Edition.)

It appears also from the same judgment that two other *pandits* were examined, and were asked whether they agreed with, or differed from, the opinions of the Court *pandits.* Their answer was :—

"We agree upon all points with the opinions given by the Court *pandits* yesterday, with this exception : they yesterday stated that gifts of movable and immovable property made by a widow, for other than allowable causes, were not valid against herself or the next heir of her husband. We agree with them that such gifts are not valid as against the next heir of her husband; but we say that they are valid as against the widow who could not reclaim them, whereas the heir is entitled to do so." (*Idem.*)

In Fulton's Reports, page 73, *Káli-chánd Dutt* versus *Moore and others,* Ryan C. J., says :—

"That a grant made by a widow for her own life is good, has been decided in this Court."

Upon the whole, after considering all the cases upon the subject, we are of opinion that a conveyance by a Hindú widow, for other than allowable causes, of property which has descended to her from her husband, is not an act of waste which destroys the widow's estate and vests the property in the reversionary heirs, and that the conveyance is binding during the widow's life. The reversionary heirs are not, after her death, bound by the conveyance; but they are not entitled, during her life-time, to recover the property either for their own or for the use of the widow, or to compel the restoration of it to her. If the widow in any case be imposed upon and induced to execute a conveyance by fraud, the conveyance will, in such case, as in all other cases of fraud, be void.

It has been urged that the reversionary heirs may be prejudiced if they cannot sue for the property during the widow's life, for after her death it may be difficult to procure the necessary evidence to show that the conveyance was executed for causes not allowable; and that, in the case of movable property, such as money or valuable securities, irreparable injury may be done to the reversionary heirs by the grantees making away with the property during the widow's life, or in the case of immovable property, by committing waste.

But our decision will not preclude the reversionary heirs, even during the life-time of the widow, from commencing a suit to declare that the conveyance was executed for causes not allowable, and is therefore not binding beyond the widow's life. Nor will it deprive the reversionary heirs, during the life of the widow, of their remedy against the grantee to prevent waste or destruction of the property, whether movable or immovable in the event of their making out a sufficient case to justify the interference of the Court.—Full Bench Reports of the Calcutta High Court from 1862—1868, page 48. Sutherland's Full Bench Reports, page 165.

CALCUTTA H. C. A.—*The 20th of May*, 1869.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble F. A. Glover, *Judge*.

RAM MONOHUR SINGH and others (Plaintiffs) Appellants,
versus
KOOLDEEP NARAIN SINGH and another (Defendants) Respondents.

A reversionary heir has no right to set aside a deed of sale executed by a Hindú widow during her life-time.

A reversionary heir is subject to all rights which exist against the property in consequence of acts done by, or decrees obtained against, the ancestor.

Peacock, C. J.—This is a suit to set aside a deed of sale executed by a widow upon the ground that there was no necessity. The suit is brought by a reversionary heir in the widow's life-time, but a reversionary heir has no right to set aside a deed in the widow's life-time, because if the deed is set aside, it destroys the purchaser's right even during the widow's life-time. But the grounds upon which it is said that there was no necessity fail, even if this had been a suit merely to declare that the deed was not binding upon the reversionary heir.

The first ground of necessity was a decree obtained against the widow's husband in his life-time. The reversionary heir says that he is not bound by that decree, that it ought to have been proved as against him that there was a good cause of action against the

husband; but there can be no doubt that the reversionary heir is subject to all rights which exist against the property in consequence of acts done by the ancestor or decrees obtained against him. If the decree had been executed, a portion of the estate might have been sold. The widow in this particular case, having regard to the amount of the income, was not bound to apply it in satisfaction of the decree in order to prevent the judgment creditor from executing his decree.

As to the other transaction, the suit is to set aside a deed by which the widow of the plaintiff's ancestor raised 150 rupees for her maintenance during the time of the famine. I think, however, that necessity was sufficiently made out in this case. Evidence was given merely as to the general amount of the widow's income, and it was not proved that she could, or did in fact, collect the rents of her estate during the famine. If she had received them, they would not probably have exceeded 600 rupees a year. But whatever may have been the amount of her income, it was not proved that during the year of the famine she collected any part of it, and the judge has found that no extravagance was proved against her. Under these circumstances, I think a case of necessity has sufficiently been established.

The decree of the Lower Appellate Court will be affirmed with costs.

Glover, J.—I am quite of the same opinion.

W. R. S. Vol. XI, c. r. p. 514.

A conveyance by a Hindú widow, without proof of necessity to justify an alienation of ancestral property, can only operate as a conveyance of her life-interest.—*Tarinee Churn Banerjea* v. *Nund Coomar Banerjea.*—S. W. R. Vol. I, c. r. p. 47.

When alienations of her husband's estate are improperly made by the widow, they are good as against her for her life, and the reversionary heir's cause of action does not arise until her death. But when property belonging to the husband's estate, is held adversely to the widow; and never reaches her hands, the cause of action accrues to her, and a suit, whether by her, or by the reversionary heir, must be brought within the usual period, counting from the commence-

ment of adverse possession.—*Nubeen Chunder Chukerbutty* v. *Issur Chunder Chukerbutty* and others.—S. W. R. Vol. IX, (F. B.) p. 505.

Sale by a Hindú widow is not invalid if made without collusion. But the sale is limited to the widow's life-interest and the reversioner is only entitled to declaration that the sale will not affect or prejudice his interests beyond the widow's life.—*Ramgutty Kurmokar* v. *Boistob-churn Mujoomdar.*—S. W. R. Vol. VII, p. 167.

The widow of one of the brothers of a divided Hindú family, governed by the *Mitákshará* law, does not acquire an absolute interest in her husband's separate estate, but only such an interest as would render her acts conveying her interest to a third party binding as against herself, but not as against the reversionary heirs, unless the alienations were made under legal necessity.—*Chut Banoo* v. *Ram Kishen Singh.*—S. W. R. for 1864, p. 102.

Alienation by a Hindú widow of property inherited from her deceased husband is valid for the period of her own life, though the conveyance may purport to convey a greater interest.—*Milgirappa bin Sulbappa* v. *Shivappa bin Erappa.*—Bom. H. C. Rep. Vol. VI, A. C. J. p. 270.

Held that a Hindú widow having a life-interest only in the property inherited from her husband has independent power of sale over the same to the extent of such life-interest and no further.—*Maya-ram Bhae-ram* v. *Moti-ram Govind-ram.*—Bom. H. C. Rep. Vol. II, page 331.

A sale by a widow of property derived from her husband, who was divided in interest from his own family, is valid for her life, such a sale will not be set aside at the instance of a divided brother of the husband.—*Bhagavatomma* v. *Pampanna Gand* and others.—Mad. H. C. Rep. Vol. II, p. 393.

A Hindú widow has the fullest beneficial interest in her husband's property inherited by her, for life. She takes as heir a proprietary estate in the land, absolute for some purposes, although in some respects subject to special qualifications, and her disposition of the property is good for her life.

The proposition that a widow has no estate in her husband's immovable property, but only a personal enjoyment of the usufruct, is untenable.—*Kámávadhani Vénkata Subbaiya* v. *Joysa Narasinghappa.*—Mad. H. C. Rep. Vol. III, p. 116.

HARADHUN NAG, *versus* ISSUR CHUNDER BOSE.

The claim of the plaintiff is for setting aside the deed of sale, as well as for recovery of possession, and so far as this last relief is concerned, the special appellant has undoubtedly no right to dispossess the widow, or the purchaser holding under her, during the lifetime of the said widow.

But as far as the right of the appellant is confined to his obtaining a declaration that the sale is invalid against him, on his establishing that the sale was made without the necessity recognized by the Hindú law, we think (*vide* page 165, of the special number of Sutherland's Weekly Reporter*) that the plaintiff, special appellant, is entitled to sue for only that special relief.—S. W. R. Vol. VI, p. 222.

K, a Hindú widow, while in possession, granted a *putnee* lease of property which was afterwards sold and purchased by B.

Held, that if there was no legal necessity to justify the alienation, the *putnee-dar* acquired no more title than the life interest, but if there was, then B's purchase was subject to the *pottah* granted by the widow as a valid alienation of prior date.—*Bisso-nath Chunder* v. *Radha-kristo Mondul.*—S. W. R. Vol. XI, p. 554.

A lease granted by a childless Hindú widow is valid, and enures for the life of the widow.—*Mussummat Mohun Coower* v. *Baboo Zoramun Singh.*—Marshall's Reports, p. 166.

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* *Ante*, page 342.

Held, that an action instituted by reversionary heirs against a Hindú widow, in her life-time, to invalidate alienations by her of her husband's ancestral property and to deprive her of the management in consequence, and to obtain possession themselves, will lie.

Alienations having been proved to an extent entirely subversive of the rights of the heirs, and the *Onoomuti puttur*, or the deed of authorization, under which they were alleged to have been made, having been declared invalid, the widow was deprived of the possession as well as the management of the property, which was placed in the hands of heirs, with the exception of the family-mansions: They were directed to pay the whole of the profits, arising from the several properties, into the Zillah Court, quarterly, for the benefit of the widow, during her life-time. In the event of their failing to fulfil this condition, for a period exceeding three months after any payment becomes due, the Zillah Court is to report the circumstance with a view to having the property placed in the hands of a surburah-kar or receiver.

Sale of part of the property presumed from lapse of time and other circumstances to have been made in satisfaction of a decree of Court against the deceased proprietor, held to be valid.—*Nundloll Baboo* and *Mudunloll Baboo* versus *Bolakee Bibee*;—and *Bolakee Bibee* versus *Nundloll Baboo* and another.—S. D. A. Dec. for 1854, p. 351.

Remark.—This decision, not the unanimous decision of the Court, has been generally looked upon as extremely harsh, and it has been since modified, especially by the observations of the Sudder Court, in the (following) case of Golak-monee Dossee, Appellant. *Vide* Laul Soonder Doss *v.* Hurry Krishna Doss. Post.

CALCUTTA S. D. ADAWLUT.

Case No. 243 of 1858.

GOLUK-MUNEE DOSSEE (one of the Defendants) Appellant

versus

KRISHNA PROSAD KANOONGO and others, Respondents.

Case No. 244 of 1858.

NITYANUND MALUTEE v. KISHEN PROSAUD KANOONGO and others.

MUSST. ANNO POORNA DEBEE v. KISHEN PROSAUD KANOONGO and others.

Held by the majority of the Court, that suits by reversionary heirs, though their interest is not vested, but only contingent, to restrain waste, or alienations in the nature of waste, by a Hindú widow, will lie.

Held also in accordance with the precedent of Nundloll Baboo *versus* Bolakee Bibee, that when alienations by a Hindú widow, utterly subversive of the rights of the heirs in reversion, are proved, and it is shown that, but for the interference of the Courts, ultimate loss to the heirs who may succeed eventually will ensue from the conduct of the tenant in tail in possession of the property, this Court, with a view of remedying, or rather preventing, such loss, will step in, and appoint a receiver to take charge of the estate. The reversionary heir may be the receiver, but his appointment as such is not by virtue of his reversionary right, but on a consideration of what is most for the benefit of the estate.

Held, moreover, that when a stranger is appointed as receiver, security should be demanded, but when a reversioner is appointed, his interest in the retention of the management and in the welfare of the property may stand in the place of security, the more especially as it is always in the power of the widow to move the Court either for the appointment of a fresh receiver, or for the demand of security, should the rents and profits be not regularly paid over as directed.

Judgment:—

Messrs. C. B. Trevor, and G. Loch:—There is no question at the present time that suits by reversionary heirs, though their interest is not vested, but only contingent, to restrain waste or alienations in the nature of waste, by a Hindú widow in possession, will lie. This point has been decided frequently both in the Supreme and this Court.* The only question regarding which any contention can be raised is, whether, on waste or on alienation being proved, it is legal or proper to divest the widow of possession placing the reversioners in possession as receivers, and making them liable to her for the rents and profits during her life-time.

We are unable to find any case on the point reported as having occured in the Supreme Court, but it appears to us not improbable

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* See Cases of *Hari-dass Dutt* versus *Rangan-mani Dasee.* Taylor and Bell's Reports No. 2, page 185 ; and *Ojjal-mani Dasee* versus *Jaga-mani Dasee.—Ibid* No. 1, p. 370.—See also decisions of S. D. A. for 1854, pp. 351, 373.

looking to the principles on which that Court, as a Court of equity, acts, that, on bill filed and proof given of illegal alienations, of the nature of waste, by the widow, the Court would appoint a receiver, and if it were for the benefit of the estate, would appoint the reversioner as such receiver.

Turning, however, to the decisions of this Court, we find the case of *Nand-lall Baboo* versus *Bolakee Bibee** which has, since it was passed, been the leading case on the point before us. In that case alienations were proved to an extent entirely subversive of the rights of the heirs, and, the deed of authorisation under which they were alleged to have been made having been declared invalid, the widow was deprived of possession of the property, which was placed in the hands of the reversioners with directions that they should pay the whole net profits arising from the several properties into the Zillah Court quarterly. In the event of their failing to fulfil this condition for a period exceeding three months after any payment became due, the Zillah Court was directed to report the circumstance with a view to having the property placed in the hands of a *Sarbaráh-kár* or receiver.

It is now objected, that this decision is not in conformity with Hindú law, under which, during her life-time, the widow cannot, under any circumstances, be deprived of possession of her husband's property. This objection mis-apprehends the ground upon which the decision objected to was passed. It was not passed in accordance with Hindú law, but in accordance with those principles on which a Court of equity should act. Those principles regard the remedy to be applied, and do not affect the rights of parties under Hindú law, which they leave intact.

We do not, and cannot, after the decision of the Privy Council in the case of *Káshí-náth Basák* and *Ramá-náth Basák* versus *Hara-sundarí Dásí* and *Kamal-mani Dásí*, decided by the Privy Council,† regard the nature of a Hindú widow's interest in exactly the same light as it was regarded by the Judges who decided the suit in this Court in 1854; but, looking upon it not as a mere life estate, but as a restricted estate of inheritance, we, in accordance

* See decisions of S. D. A. for 1854, pp. 351, 373, *ante*, p. 352.

† Clarke's Reports p. 91; and *Vyavasthá Darpana* (2nd Ed.) p. 97.

with that decision, think that, on sufficient proof by the reversioners being given that, but for the interference of the Courts, ultimate loss of them as to the heirs who may succeed eventually will ensue from the conduct of the tenant in tail in possession of the property, and with a view of remedying, or rather of preventing, such loss, this Court should step in and appoint a receiver to take charge of the estate. The proof, though inferential, must be clear and cogent; and unless the evidence lead inevitably to the conclusion that the heirs will be damnified if she be left in possession, the widow should not be divested of the possession of her husband's estate.

The conduct of the widow may not amount to what is technically called waste; but extending the meaning of that term to any illegal act of alienation, either directly or indirectly, injuriously affecting the interest of the reversioners—alienations contrary to the nature of her estate, and therefore in the nature of waste,—we think that the same course should be pursued as should also be followed in a case of technical waste.

In placing the reversioners in possession, it is to be understood that, in a case like that before us, they are in possession not by any right appertaining to them, but simply as receivers, and on a consideration that, as heirs in reversion, they have the strongest interest in the well-being of the property entrusted to their care.

For the reasons then above given, we see no room to doubt that a suit of the nature of that out of which the present special appeals have arisen, *viz.*, one by a reversioner for the setting aside of illegal alienation during the life-time of the widow, coupled with a prayer for possession as receiver, is maintainable in our Courts. And as the Judge finds, whether rightly or wrongly, that the alienations made are so subversive of the reversioner's rights as to justify the removal of the widow from possession, in order, it would seem, to prevent future acts of the same nature, we see no ground for interfering in special appeal with the decision passed by him.

As to the second objection raised in special appeal, it is not one to which we can listen in special appeal. The power of the Courts to appoint a receiver in such a case being clear, the details connected with such appointment must be left to the Courts themselves. As a general rule, on the appointment of a stranger as receiver, security should be required; but in a case in which the reversioner

has been appointed the receiver, his interest in the retention of the management and in the welfare of the property may, in the Court's judgment, stand in the place of security, more specially as it is always in the power of the widow to move the Court either for the appointment of a fresh receiver, or for the demand of security, should the rents and profits be not regularly paid over to her as directed.—S. D. A. Decis. for 1859, pp. 210, 214.

CALCUTTA H. C. A.—*The 24th of June,* 1868.

Present:

The Hon'ble G. Loch, and F. A. Glover *Judges.*

MUSSUMMAT MOHA-RANEE and another (Defendants) Appellants,

versus

NUDDU LALL MISSER (plaintiff) Respondent.

Where waste is proved on the part of a widow, the Court should not put a reversioner into possession; but should appoint a manager (who might be the reversioner) who should be required to render accounts periodically. Leases which have been given by the widow cannot be interfered with, unless the lessees be making waste.

Loch, J.—Waste on the part of the widow has been proved, and the Lower Courts have given the reversioner possession, and directed that his name he registered as a joint proprietor with the widow. We think the order is wrong. The Court should not have converted the reversioner into an actual proprietor. It should have appointed a manager accountable to the Court for all his acts in respect of the estate, who should be required to render accounts periodically, and be put in possession of all the property in the widow's own possession. Leases which have been given by her can not be interfered with (as laid down by the Full Bench in the special number of the Weekly Reporter pages 165 and 166), unless the lessees be making waste; and if the charge be proved then the Court can take measures to preserve the property given in lease. There is nothing to prevent the Court appointing the reversioner to be manager if he be a fit person for the appointment. We modify the orders of the lower court accordingly.—S. W. R. Vol. X, c. r. page 73.

Family jewels, if part of the ancestral property, are not transferable by a widow except for special purposes; and acts of waste on the part of the widow in regard to her husband's property, if proved, would be a ground for withdrawing a certificate granted to her under Act XL of 1858.—*Bhagwanee Koonwur* v. *Parbutty Koonwur.*—S. W. R. Vol. II, Mis. p. 13.

Declaration of title may be granted to reversioners, and alienations by a Hindú widow set aside during the widow's life-time, although possession of the estate itself will not be ordinarily given. *Mussummat Shibo Koeree* and others v. *Joogun Singh* and others.—S. W. R. Vol. VIII, p. 155.

In the case of *Káshi-náth Basák* and *Ramá-náth Basák* versus *Hara-sundarí Dásí* and *Kamal-mani Dásí* (Clarke's Reports, p. 91,)—Lord Gifford in his judgment mentions an opinion of certain *Pundits* that the female Hindú heir may be restrained from abusing her power of disposition. This opinion is supported by the authority of all the text-writers: it is most consistent with the general principles of the Hindú law as to females; and also perfectly consistent with reason; for surely there ought in reason to exist somewhere the power of preventing an alienation against her duty by one whose power of alienation is limited by the law, and who owes a duty to those in succession to preserve the corpus of the estate. Yet of what value would be a power of prevention, to which no Court of justice would give effect? It remains to consider whether the bill states a sufficient case of waste. No doubt the remedy should not extend beyond the mischief.—Part of the decision passed by the Supreme Court of Calcutta in the case of *Hari Dass Dutt* versus *Rangan-mani* and others. See Bell and Taylor's Reports, Vol. II, Part 5, p. 279; and *Vyavasthá Darpana,* (2nd Ed.) p. 124.

PRIVY COUNCIL.

On appeal from the Supreme Court at Calcutta.

HURRY DASS DUTT, Appellant,

versus

SREEMOTEE APOORNA DOSSEE and another, Respondents.

A Court of equity will not interfere, unless it is shown that there is danger from the mode in which the tenant for life in possession is dealing with the property. The mere fact of the tenant for life keeping in hand for about three months part of the corpus for the alleged purpose of an illegal investment does not amount to waste; nor is in derogation of those entitled in reversion.

The title of a Hindú widow to her husband's property, though a restrictive one, is not in the nature of a trust. Whether by the Hindú law current in Bengal the interest of a daughter in the estate of her deceased father, is of the same nature as that of a widow. *Quære*.

Their Lordships do not think it necessary to trouble the Counsel for the Respondent. This Bill is filed by a party entitled to property secured during the life of the tenant for life; and the Bill proceeds on the ground that the property is endangered from the manner in which the tenant for life is dealing with it. The tenant for life is the daughter of the intestate *Hirá-lal Mallik.* It has been decided by this Court in the case of *Káshi-náth Basák* versus *Hara-sundari Dásí,* after most full deliberate argument and consideration, that the principles which are applied in Courts of equity in *England,* for securing in the public funds any property to which one person is entitled in possession, and another is entitled in remainder, are not applicable to the case of property in India, where such property is in possession of a Hindú widow.

Now, the Bill alleges, that, in this respect, the widow and the daughter stand in the same situation. Whether they stand in the same situation or not, with respect to the right of disposition of the property, they at all events stand in the same situation as to the right of administration, and right of enjoyment for their lives; and the principle laid down in the case which has been referred to in this Court was this, that it is not sufficient to say that there is one person entitled in possession, and another entitled in remainder, in order to induce the Court to interfere to take the property out of the hands

of the individual who is in possession of it; but it is necessary to show that there is danger to the property from the mode in which the party in possession is dealing with it, in which case, and in such case only, the Court will interfere.

The law, therefore, being perfectly settled by that decision, and that decision having been followed during the time Sir Edward Ryan presided over the Supreme Court, and also his successor, Sir Lawrence Peel, it must be considered as the settled law of the Courts in Bengal.

The question here is, has any thing been shown in this case to justify interference, or has the case, alleged in the Bill, been established by evidence? The only evidence which exists being the answer of the defendant. It appears to their Lordships, it has not been made out at all. Can it be said, that the respondent, who according to the ordinary Hindú custom, keeps in her house a certain portion of the money, having in the course of three months, invested Rs. 39,000, three fourths, or at least two thirds, of the money in other securities, was guilty of a *devastavit*, or shewed the slightest intention of committing a *devastavit* in this respect. Their Lordships are of opinion that no such case is made out; and as the ground upon which the Bill was filed, therefore, entirely fails, the appeal must be dismissed with costs.

We must observe, that no such instance has been produced, either from the native or the Supreme Courts in which any order has been made for such interference, except in a case in which manifest danger, or risk of danger, has been proved to the satisfaction of the Court.

Their Lordships will advise Her Majesty to affirm this decree with costs.—Moore's Indian Appeals, Vol. VI, p. 433.

CALCUTTA, H. C. A.—*The 26th of August* 1862.

Present:

W. Morgan, C. Steer and Sir Charles Jackson, *Judges.*

LOLL SOONDER DOSS, *versus* HURAY KISHEN DOSS.

A Hindú widow, entitled to a life-estate only, granted a *putnee* of the lands. *Held first*, that this did not work a forfeiture entitling the reversioners to enter. *Secondly*, that the reversioners were not entitled to have the *putnee* set aside.

Thirdly, to justify divesting a Hindú widow of her possession on the ground of waste, there must be clear evidence of acts on her part tending to injure the reversioners.*

This suit was instituted by reversioners against a Hindú widow and her *putnee-dar*, impugning the act of the widow in granting the *putnee* as an act of waste prejudicial to their interest, and claiming immediate possession of the estate, and to set aside the *putnee* as invalid.

Jackson, J.—This case has been referred to me in consequence of the difference of opinion between the judges who heard it in the usual course.

The question now is whether the cause of action is one upon which the plaintiff was entitled to a decree. The respondent's pleader urged upon the court the well-known case of Bolakee Bibee Appellant.† That decision, not the unanimous decision of the court, has been generally looked upon as extremely harsh, and it has been since modified, especially by the observations of the Sudder Court in the case of Goluck-monee Dossee Appellant,† and I think looking at the light in which the *status* of the Hindú widow is now viewed, it would always be ruled at this day that to justify a suit for divesting the widow of possession, there must be clear evidence of acts on her part tending to injure the property, so that interference of the Courts is necessary to prevent ultimate injury to the eventual heirs. The criterion, therefore, in this case would be the plaintiff's success or failure in showing that ultimate loss to them would result from the widow's act. I do not see that any of the sort is established. The Principal Sudder Ameen calls the granting of this *putnee* an alienation, but I cannot see that it is so. It has the effect of diminishing the gross sum which the widow will receive by way of rental. It cannot be doubted that she might grant a lease for years or one not going beyond her life-time. If on her death the next heirs seeking to enter on the estate, should be met by the allegation of *putnee*, they will no doubt sue to get rid of the incumbrance and will presumably succeed. But I see no act of waste on the part of the widow, and nothing which gives any foundation for the present suit. I, therefore, concur with Mr. Justice Morgan in reversing the

* *Vide* Ind. Jur. for 1862-63, p. 82 and Norton's Leading Cases, Part II, p. 654.

† *Ante*, pages 352 and 353.

decree. It is accordingly reversed.—Marshall's Reports, Vol. I, page 113. Ind. Jur. for 1862-3, p. 82.

When the validity of an alienation by a Hindú widow is the question for the consideration of the Court, the *onus* of proving the necessity for the alienation rests with the defendant. Where in such a case the plea of necessity fails, the Court will not grant a decree for immediate possession, unless a very strong case of waste and deterioration is made out.—*Chutter-dharee Singh* and others v. *Mussummat Hur-Coomaree* and others.—Ind. Jur., for 1862-1863, page 99.

An attempt at a false adoption of a son does not render a widow liable to the penalty of absolute forfeiture of the property by her for the benefit of the reversioners.

No acts of waste or fraudulent alienation of the property being alleged, the Court declined to interfere with the widow's management. *Kumol-monee Dossee* v. *Ahlad-monee Dossee* and another.—S. W. R. Vol. I, c. r. p. 256.

A Hindú widow cannot be compelled, without proof of waste, to give security for the value received by her of lands belonging to her husband's estate taken by a Railway Company.—*Bindoo Basinee Dossee* v. *Bolie Chand Sett.*—S. W. R. Vol. I, c. r. p. 125.

Suit by a reversioner to set aside an alleged fabricated deed of alienation said to have been executed by his ancestor and supported by the widow.

Held, that the suit in this form could not be maintained during the widow's life-time, whatever right the plaintiff might have either to obtain a declaration that the deed was not binding beyond the widow's life-time, or to procure the interference of the Court to prevent waste.—*Mussummat Ram Banee Koonwar* and others v. *Mussummat Muheshur Koonwar* and others.—S. W. R. Vol. I, c. r. page 338.

A conveyance by a Hindú widow, for other than allowable causes, of property which has descended to her from her husband, is not an act of waste; destroying the widow's right, and vesting the property in the reversioners, but is binding only during the widow's life-time.

The reversioner can, during the widow's life-time, sue to obtain a declaration that the conveyance is not binding beyond the life-time of the widow, and also to prevent waste.—*Mucheeram Sein* v. *Gour Ghooee.*—S. W. R. (F. B.) 165.

Relative to Reversionary Heirs.

The rule of Hindú Law is that, in the case of inheritance, the person to succeed must be the heir of the last full owner. On the death of the last full owner, his wife succeeds as his heir to a widow's estate, and on her death the person to succeed is the heir, at *that* time, of the last full owner.—*Bhoobun-moyee Debea* v. *Ram-kishore Acharjea.*—S. W. R. Vol. III, P. C. p. 15.

CALCUTTA, S. D. A.—*The 9th of April* 1833.

LAXMI NARAYAN SINGH and BECHAN KUMARI, Mother and Guardian of the Minor GADA-DHAR PARSAD, son of the late SIVA DUTT NARAYAN SINGH, Appellants

versus

TULSEE NARAYAN SINGH, HAR-DEV NARAYAN SING and GUNG-DEV NARAYAN SING, Respondents.

The reversionary heirs to an estate of a sonless Hindú, vacated by his widow's death, to which she succeeded, are *his* heirs surviving at *her* decease;—so that of several kinsmen of equal degree who would have jointly succeeded, but for the widow, if any die in the interim between the deaths of the husband and widow, their heirs are excluded.

Baboo Daryao Narayan Singh, a *Zemindar* of Zillah *Sarun*, had five sons, Sarva Narayan Singh, Narsingh Narayan Singh, Fateh Narayan Singh, Partap Narayan Singh, and Harakh Narayan Singh, who separated and divided. In 1220 Fateh Narayan Singh died childless possessed of certain *Talukas* in Bál and other Pergunnahs, and other real properties in that Zillah. His widows Ram Kumari and Talimand Kumari succeeded as his heirs, and were recorded in the Collector's office in regard to the lands registered therein. Narsingh Narayan Singh died in 1214 *Fusli*, and left

three sons Nidh Narayan Singh, Sidh Narayan Singh, and Laxmi Narayan Singh.

On the 23rd February, 1828, in the Provincial Court of *Patna*, Tulsee Narayan Singh, the son of Siva Sankar Narayan Singh, the eldest son of Partap Narayan Singh, and his cousins Har-dev Narayan Singh and Gang-dev Narayan, the sons of Sarup Narayan, the second son of Partap Narayan Singh, against Laxmi Narayan Singh, and Siva Dutt Narayan Singh, instituted the suit.

The plaint was to this effect:—"When Fateh Narayan Singh died, he was survived by six nephews. The Defendant Laxmi, the Defendant Siva Dutt and his brother Aditya, since dead; Siva Sanker, father of Tulsee; Sarup, father of Gang-dev and Har-dev;—and Udit, son of Sarva Narayan. These six nephews were his heirs. His widows merely by way of alimony held deceased's estate. Those of the six nephews who died are represented by their sons respectively. The estate of Fateh Narayan should be divided into four shares. We, as representatives of Siva Sankar and Sarup Narayan, the sons of Partap Narayan who survived their uncle Fateh Narayan,—are entitled to one share.

On the death of Siva Dutt, Bechan Kumari, his wife, appeared, on the part of self and his minor son Gada-dhar Parsad, to defend.

On the 2nd March, 1830, Sir James Harington, a Judge of the Provincial Court, passed a decree, with costs, in favour of Plaintiffs.

From this decree, Laxmi Narayan preferred an appeal to the *Sudder Dewanny Adawlut* in which the widow of Siva Dutt afterwards joined.

On the 21st November, 1832, the case was first heard by Mr. R. Walpole, a Judge of the Court, who proposed to amend the decision of the Provincial Court in the mode and for the reasons thus stated in his judgment.—"I find on consulting the *Pandit* that on the death of a widow who took her husband's estate when brothers and brothers' sons concur, the succession is regulated by propinquity. Who then, on this principle, were the heirs on the death of Ram Kumari? It is clearly proved that three nephews of Fateh Narayan Singh were then surviving,—the two original defendants and Siva Sanker, the father of the plaintiff Tulsee. Under these circumstances, they succeeded to the estate of Fateh Narayan Singh. His grand nephews, Har-dev Narayan Singh and Gang-dev Narayan

Singh, sons of Sarup Narayan Singh, who had pre-deceased Ram Kumari by three years, are barred of heritable right.

The case next came on before Mr. R. H. Rattray on the 27th November, 1832, who recorded his concurrence in the judgment proposed by Mr. Walpole.—Sel. S. D. A. Rep. Vol. V, p. 182 (New Ed. p. 330.)

CALCUTTA, H. C. A.—*The 4th of December* 1867.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

RAM SHEWUK ROY and others (some of the Defendants), Appellants,

versus

SHEO GOBIND SAHOO (Plaintiff), Respondent.

A Hindú widow takes, with her husband's estate, the power of alienation; and conveyances made by her give a good title, liable only to the superior claim of such of her husband's heirs as may be alive at the time of *her* death.

Following a decision of a Division Bench of the High Court, it was held that, on the death of a Hindú widow, her deceased husband's heirs become entitled to all his immovable property which was in her hands, except only so much as might have been disposed of by her under circumstances which would render her alienations binding against them.

In such a case the heir's cause of action, in a suit to obtain possession, accrues on the day of the widow's death.

The sale of a Hindú widow's *rights and interests* in her husband's estate, in execution of a money-decree against her, does not touch the estate.

Collectorate *chellauns* acknowledging the receipt of Government revenue, were held to be no evidence of the necessity for the sale of the ancestral property on account of which the revenue was paid.

The facts, so far as they are necessary to render the matter of litigation intelligible, may be shortly stated as follows:—

The property in suit which is very extensive, consists of a four anna share in a considerable number of mouzahs, and it was formerly the separate estate of one Baboo Digambur Sing. On his dying, very many years ago, without leaving any issue surviving him, his widow, Bal Kooer, took the property for the estate of a Hindú widow. She was young at that time, but she lived to attain a great age. During the early part of her widowhood, she encumbered or

made away with the whole of the property in question, and the substantial defendants in these suits are her alienees, or their representatives, claiming under conveyances, which all date back more than twenty-five years. At the death of Digambur, it seems that Raj Coomar Sing, Moharaj Sing, and Joobraj Sing, the three minor sons of his deceased brother Nityanund, were his nearest of kin and entitled to succeed to his property, had the widow been then out of the way. Both Moharaj and Joobraj died during the life-time of Bal Kooer. The former had no issue, but the latter left a son Gunga Persaud *alias* Ghuseetun Lall, who with his uncle Raj Coomar, survived the widow, and is a prominent figure in the present suits.

(The most important part of the judgment in these cases is as follows:—)

Then comes the question, did Raj Coomar become entitled to that property at Bal Kooer's death, notwithstanding that lady's alienations? He was at that time the sole nearest of kin to Digumbur alive, and by Hindú Law, whether of the Benares or Bengal School, his sole heir. If the law applicable to the case were that of Bengal, it is admitted that the answer to this question would depend simply on the circumstances under which the alienations were respectively made. But the law by which the parties are bound is that of the Mitákshará, and the appellants urge that under that law, when the widow takes her husband's estate in default of male issue surviving him, she takes it as *woman's property*, descendible to her own heirs instead of her husband's heirs, with complete power of alienation over it. This point was very ably argued before us, and if the matter were *res integra*, I should require much time for consideration before I should be able to come to the conclusion, on the Benares texts, that the appellant's contention is wrong. But it seems to me that the question has already been judicially decided by this Court. In the suit of Onoop Roy *versus* Goberdhun Nath, (reported in III, Weekly Reporter, page 105,)* of a Division Bench of this Court, after reviewing or referring to most of the authorities which bear upon it, held distinctly that under the Mitákshará Law "as regards the *immovable* property inherited by a widow from her husband, she has nothing but a life-interest,

* See *Ante* pages 275—286.

and cannot dispose of it except under peculiar circumstances, and under certain restrictions."* It further held that on her death it went to the heirs of her husband. It is true that the argument upon which the Court founded its judgment is not altogether satisfactory. Still the Court in that case, deliberately setting aside the disposition of the property made by the widow, declared the husband's heir, living at her death, entitled to recover against her devisee, and as this decision seems to me strictly in point, I feel myself bound to be guided by it, because I am not prepared to express my dissent from it, and on that ground to make a reference to the Full Court.

Following this precedent, it appears to me that on the death of Bal Kooer, Raj Coomar became entitled to all Digumbur's immovable property which had been in her hands, excepting only so much as might have been disposed of by her under circumstances which would render her alienations valid against her deceased husband's heirs. He, therefore, at the same time acquired the right to bring a suit for possession against all persons, who wrongly kept him out of possession of that property. He did not himself obtain possession, and Deo Coomar, his son, admits that since his father's death, he has conveyed his rights in two annas of Digumbur's property to Sheo Gobind so that as between these two persons, each has a right to sue for recovery of a moiety of Digumbur's estate, and subject only to such titles to the same as Bal Kooer's alienees may be able to establish.—S. W. R. Vol. VIII, p. 519.

See *Rooder Chunder Chowdhry* v. *Shumbhoo Chunder Chowdhry*.—Sel. S. D. A. Rep. Vol. III, p. 106; and *Mussummat Joymonee Debea* v. *Ram-joy Chowdhry*.—*Ibid.* p. 289.

See also *Bhoop-narain Sahoo* v. *Baboo Jobraj Singh*.—S. D. A., Decis. of 13th January 1847, where a Hindú died leaving his widow. The next heirs were three brothers, one of the brothers died during the widow's life. It was held that his representatives did not succeed on the death of the widow.—Norton's Leading Cases Part II, pp. 520, 521.

Though a reversioner cannot obtain possession during the lifetime of a Hindú widow, yet he may be entitled to a declaration

* But see the Privy Council Decision in p. 278 which is decisive on the above point.

whether the alienations made by the widow are or are not valid and binding on the absolute heir. If the reversioner can prove that wilful default is about to take place, he will be entitled to such relief from the court as will prevent the apprehended occurrence of a sale for arrears.—*Shurut-chunder Sein* v. *Muthoora-nath Pudatick.*—W. R. Vol. VII, p. 303.

Held, that according to Hindú law, the property of a deceased person in the possession of his widow reverts at her death to the reversioners in existence at *that* time; that, consequently, the property in the present case went to the plaintiff, the nearest male heir, nephew of the deceased, Doolar Chand, to the exclusion of another nephew born deaf and dumb, and of the third party who claimed to have purchased the rights and interests of Moorut-lall, brother of the deceased, but who died before the widow.—*Balgobind-lall* and others v. *Ram Partab Sing* and others.—S. D. A. Decis. for 1860, p. 661.

A conditional sale is an alienation, the validity of which a reversioner to a Hindú widow is, by Hindú law, entitled to question. *Odit-narain Singh* v. *Dhurm Mahton.*—S. W. R. for 1864, p. 263.

When a childless Hindú widow is the heiress and legal representative of her husband, the reversionary heirs are bound by decrees relating to her husband's estate, which are obtained against her without fraud or collusion, and they are also bound by limitation by which she, without fraud or collusion, is bound.—*Nubeen Chunder Chukerbutty* v. *Issur Chunder Chukerbutty* and others.—S. W. R. Vol. IX, (F. B.) p. 505.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble W. S. Seton Karr, *Judge.*

SUGEERUN BEGUM (one of the Defendants) Appellant

versus

JUDDOO-BUNS SUHAYE and others (plaintiffs) Respondents.

A sale by a Hindú widow of her husband's estate under necessity cannot be set aside upon payment of the amount which it was necessary for the widow to raise or in the proportion which that sum bears to the amount for which the estate was sold.

Peacock, C. J.—In this case the plaintiff seeks to set aside the sale by the widow altogether, and he is not at liberty to set aside the sale upon payment of the amount which the defendant has proved that it was necessary for the widow to raise; nor is he entitled to have the sale set aside in the proportion which the sum for the raising of which necessity is proved bears to the amount for which the estate was sold.

This case is governed by the principles laid down in Special Appeal No. 1664 of 1867.*—S. W. R. Vol. IX, p. 284.

Where a sale was necessary, it cannot be set aside on repayment of the purchase money.—Agra Dec. Vol. I, p. 291.

A reversionary heir cannot, during the life-time of a Hindú widow, sue to set aside a sale made by her, if 12 years have elapsed since the date of the sale, though he may, during her life-time, sue to have the sale declared void and to prevent waste. Such limitation does not affect the right of suit of the reversioner after the widow's death when he succeeds as heir.—*Subadara Bibee* v. *Mohendro-nath Bose*—S. W. R. Vol. II, p. 271.

The right to bring a suit for possession as heir to a deceased person does not accrue during the life-time of the deceased's widow. *Rooknee Kant* alias *Anund-mohun Sircar* v. *Kuroona-moyee Goopta* and others.—S. W. R. Vol. II, p. 244.

A reversioner can, during the life-time of the alienor, commence a suit to declare that the conveyance is not binding upon him beyond the life of the alienor.

A deed of conveyance by a Hindú widow is an act hostile to, and invalidates, a reversioner's rights, and as such, warrants his suing for a declaratory decree.—*Shewuk-ram Pershaud* v. *Mahomed Shumsool Huda* and another.—S W. R. Vol. XII, p. 26.

In a suit by a reversioner upon the death of a Hindú widow who had succeeded as heiress of her husband to recover possession of property by right of inheritance as next heir of the husband, the reversioner's cause of action arises at the time of the death

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* *Phool Chund Lall* v. *Rughoo-buns Suhae* to be found at page 108 of S. W. R. Vol. IX: *ante* p. 322.

of the widow, when the right of entry first accrued to the reversioner: and this is so, even when the widow in her life-time professed to adopt a son and put him in possession of the property, if the reversioner denies the validity of the adoption.—*Sree-nath Gangooly* and others v. *Mohesh-chunder Roy* and others.—S. W. R. Vol. XII, (F. B.) p. 74.

The reversioner may sue for a declaratory decree and to restrain waste, though he will not be put in possession.—*Mt. Ram Bunsee Koonwur* v. *Mt. Muheshur Koonwur.*—S. W. R. Vol. I, page 338. See *Nund-kishore* v. *Nathoo Ram.*—Agra. Decis. Vol. I, p. 223.

In *Rai-churn Paul* v. *Mussummat Peary-monee Dossy*—the Assignee of a reversioner, who had purchased the reversionary right, restrained the widow from making waste.—*Vide* Marsh. Rep. p. 622.

During the existence of a Hindú widow's interest in an estate, the assignee of a reversionary heir to her husband has no interest therein, as such assignee, which will enable him to bring a suit to have a mortgage or decree affecting the estate set aside. This is so, even though the assignee is the next reversionary heir to the husband after the assignor.—*Rai-churn Paul* v. *Peary-monee Dasee.*—Beng. L. R. Vol. III, a. c. j. p. 70.

As regards the property of which a Hindú widow never gets possession, and which is held adversely to her and to her husband's estate, limitation runs during her life-time, and if the ordinary period of limitation has elapsed since the cause of action accrued to her; the reversioner will be barred.

The mere fact of a widow making alienations during her life which are not binding on the reversioner after her death, does not entitle him to a declaratory decree.—*Brinda Debee Chowdhrain* v. *Peary Lall Choudhry.*—S. W. R. Vol. IX, p. 460.

The fact of a reversioner being an attesting witness to a conveyance by a Hindú widow, is an acquiescence on his part which precludes him from impeaching the sale on the ground of waste.

A decree against a Hindú widow for a loan to pay Government Revenue is binding on the reversioner.—*Gopal-chunder Manna,* v. *Gourmonee Dossee* and others.—S. W. R. Vol. VI, p. 52.

Debts incurred by a Hindú widow for charity in honor of her deceased husband, provision of necessaries or subsistence, maintenance of any trade or business left by the husband to his widow's management and charity on her own account, are recoverable from the heirs after her death, but they are not liable for any debts unnecessarily incurred by her.—*Umroot-ram Byragee* v. *Narayun-das Ruseek-das.*—Borr. Rep. Vol. II, p. 201.

A suit for a declaratory decree must be brought by the nearest reversioner, but there is no objection to a suit by a more distant reversioner when the prior rights of the nearer reversioner or reversioners have been waived.

A suit by a reversioner during the widow's life-time to declare a conveyance made by her to be void, must be brought within six years from the date of conveyance, Act XIV of 1859, Sec. i, Cl. 16.—Bom. H. C. Rep. Vol. X, a. c. j. p, 351.

Suit dismissed as premature, the plaintiffs not being the immediate reversioners and being unable to show collusion on the part of the more immediate heirs than themselves.—S. D. A. Rep. for 1859 p. 89.

A sale by a Hindú widow is not invalid if made without collusion. But the sale is limited to the widow's life-interest, and the reversioner is only entitled to a declaration that the sale will not affect or prejudice his interests beyond the widow's life.—*Ram-gutty Kurmokar* v. *Boeshtab-churn Mujoomdar.*—S. W. R. Vol. VII, page 167.

According to the Mitákshará, a sister's son cannot inherit.

A person having only a contingent estate during the life-time of a Hindú widow, is permitted to sue simply on the ground of the necessity that the contingent reversioner may be under of protecting his contingent interest. It is, therefore, essential to see that he has such an estate as entitles him to come in that way, *i. e.,* that he holds the character which professes.—*Thakoorain Sahibah* and another v. *Mohun Laul* and others.—S. W. R. Vol. VII, P. C. page 25.

The plaintiff as reversioner was entitled to possession, to prevent waste, as trustee for the widows during their life.—*Koroona-*

moyee Dossee and another v. *Gobind-nath Roy.*—S. D. A. Decis. for 1859, p. 944.

Held that a daughter can claim a declaration of rights in the paternal estate during the life-time of her mother.—*Jeewun Ram* v. *Musst. Roonta.*—Agra Rep. Vol. I, a. c. p. 240.

A reversionary heir cannot set aside a deed of sale executed by a widow, during her life-time.—S. W. R. Vol. XI, p. 514.

A reversioner may sue, during the widow's life-time, to obtain a declaration that the conveyance made by the widow is invalid.—S. W. Rep. Vol. III, p. 183.

When a widow is proved to have made alienations without necessity, the reversioner may be appointed to act as her trustee.—Cal. H. C. Decis. for 1862 p. 582.

A reversioner may sue to have a conveyance by a Hindú widow declared void as against him, but he cannot sue simply for ejectment and possession during the life-time of the widow.—*Hurrish Chunder Sein Lushker* Guardian of *Okhoy Chunder Sein* and another, minors v. *Brohmo-moyee Dossea* and others.—S. W. R. Vol. V, p. 131.

The mother and guardian of a minor reversioner, being herself a reversioner and of full age, may sue without obtaining a certificate under Act XL, of 1858.

A reversioner may sue during the widow's life-time to obtain a declaration that a conveyance made by the widow is invalid as made without necessity, therefore not binding beyond the widow's life.—*Woodoy Chand Jha* and others v. *Dhun-monee Debea.*—S. W. R. Vol. III, p. 183.

Sale by a Hindú widow in which she had a mere life-interest annulled, no necessity for sale having been shown.

Before a decree for immediate possession can be given in such cases to plaintiffs, it must be clearly proved, that the property has deteriorated, owing to the sale, or is wasted by the purchasers.—*Chutter-dharee Singh* and others v. *Hur-koomaree* and others.—S. D. A. Decis. for 1862. Hay's Reports, Part II, p. 107.

A person cannot sue for a declaration of his right unless he has an existing right. Mere contingent right which may never have

existence is not sufficient to ground an action under Section 15 of Act VIII of 1859.

Consequently suit by reversionary heir for declaration of his right to succeed after the death of the tenant for life will not lie.*—*Mussummat Pran-puttee Koonwar* v. *Lallah Futteh Bahadoor.*—S. D. A. Decis. for 1863, Hay's Rep. Vol. II, p. 608.

CALCUTTA, H. C. A.—*The 2nd February,* 1867.

Present:

The Hon'ble J. P. Norman and W. S. Seton Karr, *Judges.*

Cases Nos. 2398 and 2440 of 1866.

Special Appeals from a decision passed by the Judge of Patna.

CHUMMUN MOHUNT and others (Defendants) Appellants,

versus

RAJENDUR SAHOO (Plaintiff) Respondent.

A reversioner in the position of son or step-grandson (in the female line) may sue in the life-time of a Hindú widow in possession to prevent waste.

Seton-Karr, J.—The only point raised and argued by Mr. Twidale is that the plaintiff had no right to sue during the life-time of his mother and step-grand-mother. No precedents are quoted in support of this position, except one from 2 Hay's Reports, page 608, Case of Pran Puttee Koer.

Other cases have been shewn us which rule that a reversioner, such as plaintiff, may sue in the life-time of a widow in possession, in order to prevent waste and obtain a declaratory decree. (*See* S. D. A. Rep. for 1859, page 1623, and 1 Hay's Reports, page 107, 2nd August 1862, *Chuttur-dharee Singh* versus *Hurro-coomaree*).

But in the very case relied on by the appellants from 2 Hay's Reports, page 608, we find a passage which tells strongly against the appellants, and which gives good reasons why a plaintiff, such as the one before us, can institute a suit as reversioner.

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* The important part of the decision of which the above is an abstract is embodied in the following case.

In that case, page 611, the Court (Peacock, C. J., and L. S. Jackson, J.) say:—"The plaintiff would, indeed, have a right to sue and restrain the widow from waste; but his right to do this arises less from the necessity of protecting his own interests than from the function vested by the Hindú Law in the next male heir of a person whose estate descends to a female, namely, that of protecting the estate. And it is obvious that, if heirs in expectancy were debarred from suing to protect waste until the succession had actually accrued, the waste would, in most cases, be past remedy, and the estate irretrievably impaired."

We think that this rule so laid down is sound and quite applicable to the case before us; and though, in that case, the plaintiff, under the peculiar circumstances of his suit, was held not to have a right of action, those expressions do lay down a sound rule and may serve as a guide and authority in the present appeal before us.

Fully concurring in that principle, we confirm the decision of the Judge, and dismiss both appeals with costs. In case No. 2440, it is immaterial whether the plaintiff was the grandson or only the step-grandson of Mussamut Patasoo. His mother was alive, and he had clearly a right to sue to protect his own interests.—S. W. R. Vol. VII, p. 119.

CALCUTTA, S. D. A.—*The 30th of June* 1859.

H. T. Raikes and J. H. Patton, Esqrs., *Judges*, and G. Loch, Esqr., *Officiating Judge*.

NAIKRAM-LALL and BRIJOKOOMAR-LALL, (Defendants,) Appellants,

versus

SOORUJ-BUNS SAHEE, (Plaintiff,) and others, Respondents.

Suit laid at Rupees 6003-9.

Suit dismissed as premature, the plaintiffs not being the immediate reversioners and being unable to show collusion on the part of more immediate heirs than themselves.

From the pleadings, it appears that Bundhoo Sing had four sons,—Neel-kanth *alias* Kantoo-lall, Sujeebun-lall, Jugjeebun-lall and Ramjeebun-lall. Kantoolall died on the 6th of Assar 1249 F. S.

(28th June 1842), leaving a widow, Akhlasee Koowur, a daughter, Parbuttee Dai, and two grandsons, Hur-buns and Sooruj-buns, sons of Parbuttee, the former of whom has since deceased. Sujeebun-lall left two sons, Naik-ram and Lullit-ram, the latter of whom has died, leaving a son, Brijokoomar-lall. Jugjeebun had a son, Debee-persad, who died, leaving a widow, Jankee Koowur. And Ramjeebun's son, Pryag-narain, has also deceased, leaving a widow, Bhag-monee Koowur.

The contention between the parties is, whether the family is a joint undivided Hindû family, and the ancestral property held in common, or whether there has been a separation of the members of the family and a partition and separate possession of the ancestral property.

The plaintiff denies that Naikram or Brijokoomar-lall, or any other party, save himself, through his mother Parbuttee Dai and Akhlasee Koowur, is the heir of Kantoolall; and he now sues to set aside certain documents executed and published by the defendants in collusion with Akhlasee Koowur and Parbuttee Dai, in which they style themselves the heirs of Kantoolall.

In the lower court two issues were raised: *first*, whether, during the life-time of the father and mother of the minor, for Sooruj-buns was a minor when this suit was originally instituted, the minor could be represented by his uncle, who brought the suit in his name: *second*, whether there had been a separation of the family and partition of the ancestral property. The *first* issue was not tried, as the plaintiff became of age before the suit came on for trial; and on the *second* issue the Principal Sudder Ameen gave judgment for the plaintiff.

The defendants (Naikram and Brijokoomar-lall) have appealed against this decision, and raised the following issues: *first*, whether, during the life-time of Akhlasee Koowur and Parbuttee Dai, neither of whom is in possession, the plaintiff,—a distant reversioner, and who has no right to possession of the property till after the death of the abovenamed,—can bring this suit to set aside Deeds in which he is not immediately interested, some of which, as alleged by appellants, have been executed by Akhlasee Koowur; and *secondly*, whether the family is not still undivided and the property held in

joint possession, and, consequently, the widow of Kantoo-lall is entitled only to maintenance.

For the appellants it was argued that the proper party to bring this suit was Akhlasee Koowur, but not being in possession, she would be obliged to sue both for possession and for the cancelment of the Deeds, but admitting for argument's sake, that she were in possession, the plaintiff could not even then carry on the suit, unless he could show that there had been collusion, not only between Akhlasee and the appellants, but also between his mother Parbuttee and them.

We think there is no valid objection to our hearing and determining the legal point now raised, before going into the merits of the case. We consider Akhlasee Koowur to be the proper party to bring this suit, and after her, Parbuttee Dai, and that plaintiff can only come into court to set aside the acts of the defendants on proof of collusion between the defendants on the one part and Akhlasee and Parbuttee on the other. If Akhlasee be in possession, it was for her to sue to set aside the Deeds propounded by the defendants, which are injurious to the interests of herself and of Kantoo-lall's family; and if she failed to do so, Parbuttee, the mother of the plaintiff, to whom the property would devolve on the death of Akhlasee, is the proper person to bring the action. In the decision of this Court of the 20th July 1853, page 641, Ramdhun Bukshee and others, appellants, it was held that, in a sale by a childless Hindú widow, the parties whose interests are directly affected in the disputed property, and not those whose interest is merely inchoate and future, are entitled to sue regarding the infraction of Hindú law; and in another case, decided so lately as the 12th May 1859, Gogunchunder Sein and others, appellants, the same rule was laid down that, during the life-time of the immediate reversioners, the more distant were not entitled to bring a suit to set aside the acts of a widow in the management of her deceased husband's estate. One decision by a single Judge of this Court, dated the 3rd August 1850, Bhyrub chunder Chowdhree, appellant, page 369, has been brought to our notice to show that reversioners in the position of the present plaintiff were entitled to sue, and, unless the action was brought within twelve years of the act done by the widow, limitation would run from the date of such act. The rule laid down in this case has,

however, been suspended by subsequent decisions of this Court; and the rule now is, that the ordinary law of limitation does not apply to bar suits to set aside acts of waste by a childless widow, for this reason, that such acts can confer no valid title on the holder. In the case of Jugudamba Debea, of the 30th April 1858, the position of the parties was not similar to that in the present case, also in the case of Bolakee Beebee, it was the next heirs who brought the suit, and the case of Pran-puttee Koowur, also cited by the Counsel for the respondents, is not similar nor applicable to the present case.

We think, in the absence of collusion on the part of Akhlasee Koowur, who repudiates the Deeds bearing her name, and who being, as alleged by herself and the plaintiffs, in possession, is the party to bring the action to set aside those Deeds and the title set up by the defendants, the collusion of Parbuttee Dai will not give the plaintiff a present right of action. Considering, therefore, the present suit on the part of the plaintiff to be premature, we dismiss it with costs.—Sudder Dewanny Decisions for 1859, p. 891.

In suit for the recovery of a share of joint property, the plaintiff's maternal aunts, childless Hindú widows, who were entitled to a prior life-interest to which the plaintiff's reversion was subject, filed a petition disclaiming their interest, and assenting to the suit.—Held that the Judge might make a decree founded upon the disclaimer of the widows.

The statute of limitation is no bar to a suit for the recovery of a share of joint family property; where the plaintiff and defendants, Hindús, have been living together in commensality, up to within twelve years of bringing the suit; for, in such a case there can be no adverse possession so long as the family was undivided.—*Rajani-kanta Mitter* and others v. *Pran-chand Bose* and others.—Marshall's H. C. Rep. p. 241.

CALCUTTA, H. C. A.—*The* 11*th of December* 1869.

Present:

The Hon'ble Dwarknath Mitter and Sir Charles Hobhouse, *Bart., Judges.*

TILUCK CHUNDER CHUCKERBUTTY, (Defendant) Appellant,

versus

MUDDUN MOHUN JOOGEE and others (Plaintiffs) Respondents.

Misjoinder of parties is not an objection which can be allowed to be taken in special appeal.

Where a widow's estate is sold for arrears of rent, it is not merely the widow's life-interest that is transferred, and the reversionary heir cannot follow the estate after her death.

Mitter, J.—On the first point taken by the pleader for the special appellant, we are of opinion that misjoinder of parties is not an objection which can in this case be allowed to be taken at this late stage of the proceedings.

As to the second point, we think the contention of the special appellant is right. The zemindar obtained a decree for arrears of rent against the maternal aunt of the plaintiff, special respondent, who was then in possession of the estate as the legal heir and representative of her husband Mohes-chunder, and in execution of that decrce the properties which form the subject-matter of this special appeal, namely, a 7 annas share of plot No. 17 and plot No. 25, and a 3 annas and 15 gundas share of plot No. 22, were put up to sale under the provisions of Act X of 1859, and purchased by the vendor of the special appellant. The Lower Appellate Court seems to be of opinion that the effect of this sale was merely to transfer to the special appellant's vendor the life-interest which the widow possessed in the tenure. We think that this opinion is erroneous. The rent due to the zemindar cannot under any circumstances be treated as a personal debt of the widow; and if the zemindar thought it proper to put up the properties now in dispute for sale for the realization of that rent, after having obtained a decree for it in due course of law, the reversionary heir can have no right to come in after the death of the widow and take back those properties from the hands of the purchaser. If the widow

had contracted a debt to meet the zemindar's demand for rent and then alienated a part of her husband's estate for the satisfaction of that debt, the alienation would have been good and valid in law; and we do not see reason why less effect is to be given to a decree passed by a court of competent jurisdiction, in execution of which decree certain properties belonging to the estate of the widow's husband were brought to sale and purchased by the special appellant's vendor.

Holding this view of the case, we are of opinion that the decision of the Lower Appellate Court, so far as it relates to the properties mentioned above, must be reversed, and that of the first Court restored, with costs of this appeal and the costs of the Lower Appellate Court.—S. W. R. Vol. XII, c. r. p. 504.

PRIVY COUNCIL—*The 15th of July* 1874.

Present:

Sir James W. Colvile, Sir Montague E. Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

MOULVIE MOHAMED SHUMSOOL HOODA and others,
versus
SHEWUK-RAM, *alias* ROY DOORGA PERSHAD.

A Hindú widow (a Ranee) having conveyed to a *boná fide* purchaser for full value an ancestral estate beyond her own life, a reversioner brought a suit for a declaration that she had only the power to grant a life-estate, and that, after her death, he was entitled to an estate in remainder. The Courts below in India were of opinion that he should only be entitled to recover the property after the Ranee's death on payment of the full purchase-money. The High Court varied the decree so far as to declare that he should be entitled to it upon the payment of a mortgage upon the property which was existing at the time of the conveyance.

* From the judgment of Couch, C. J. and Mitter, J. (Baley, J., having dissented) in Regular Appeal No. 53 of 1870, decided on the 13th September 1870;—See iv W. R., 315.

Held, that a Hindú widow might sell such an estate absolutely if it could be shown that the conveyance was necessary in order to pay the debts of the testator and was for the benefit of the estate generally. There was no proof of such being the state of things in this case.

Held, that the judgment of the High Court was right, and that the mortgage having been paid by the purchaser, it was equitable that when the plaintiff reclaimed the estate credit should be given to the purchaser for such payment which otherwise the plaintiff himself would have to meet.

In this case a Hindú widow lady, of the name of Ranee Dhunkowur, in the year 1854, sold an estate to the defendant by a conveyance, in which she purported to give him an absolute title, what we should call in this country an estate in fee simple. Her grandson, on coming of age a great many years after, brings a suit for the purpose of having it declared in his favor that this lady had only the power to grant a life estate, and that, after her death, he was entitled to an estate in remainder.

The question depends upon the construction of a petition presented by Roy Hur-narain to the Collector in the year 1830, which has been treated by both sides in this litigation and by both courts, as in the nature of a testamentary instrument. The state of the family of Roy Hur-narian at the time of his presenting this petition was this. There were living only the before-mentioned Ranee Dhun Kowur, the widow of his son Roy Kalika Pershud, and her two daughters by that son, Bibee Shitaboo and Bibee Dularee, who at that time (1830) appear to have been unmarried. That being the state of the family Hur-narain makes this, which must be now considered as a testamentary instrument. He first recites that the property of which he is about to dispose was ancestral property; he recites the death of his son Roy Kalika Pershad, and the death of his own wife, and he recites that the widow of his son, Ranee Dhun Kowur, was alive; that she has no heirs except her two daughters, Mussummat Bibee Shitaboo and Bibee Dularee, her daughters by his son, who would be her heirs. He then uses expressions which, if they stood alone, would, in their Lordships' opinion, show that he intended to make an absolute gift to Ranee Dhun Kowur. The expressions are these:—

"And my wife too died before, only Mussummat Ranee Dhun Kowur, widow of Roy Kalika Pershad, my deceased son above-men-

tioned, who too, excepting her two daughters born of her womb, Mussummat Bibee Shitaboo and Bibee Dularee, has no other heirs, is my heir." And then he further goes on to say, "except Mussummat Ranee Dhun Kowur aforesaid, none other is, nor shall be, my heir and malik." He proceeds, however, again to refer to the daughters of Ranee Dhun Kowur, whom he had before-mentioned, it can scarcely be assumed without some purpose, for he goes on to say:—"Furthermore, to the said Mussummat Ranee, too, these very two daughters named above, together with their children, who after their marriage, may be given in blessing to them by God Almighty, are and shall be heir and malik." There is, indeed, another translation of this document which has been referred to in another case, but inasmuch as this translation appears to have been agreed to by the parties, their Lordships think they must adopt it.

It has been contended that these latter expressions qualify the generality of the former expressions, and that the will, taken as a whole, must be construed as intimating the intention of the testator that Mussummat Ranee Dhun Kowur should not take an absolute estate, but that she should be succeeded in her estate by her two daughters. In other words, that she should take an estate very much like the ordinary estate of a Hindú widow. In construing the will of a Hindú it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindús with respect to the devolution of property. It may be assumed that a Hindú generally desires that an estate, especially an ancestral estate, shall be retained in his family; and it may be assumed that a Hindú knows that, as a general rule, at all events, women do not take absolute estates of inheritance which they are enabled to alienate. Having reference to these considerations, together with the whole of the will, all the expressions of which must be taken together without any one being insisted upon to the exclusion of others, their Lordships are of opinion that the two Courts in india, who both substantially agree upon this point, are right in construing the intention of the testator to have been that the widow of his son should not take an absolute estate which she should have power to dispose of absolutely, but she took an estate subject to her daughters succeeding her in that estate, whether succeeding her as heirs of herself or succeeding her as heirs of the original testator is immaterial. It

would appear that the testator used the word "heir" as signifying the person who is to take immediately in succession to another; that he applies it to the Ranee as the person who is to take in immediate succession to him, and to the two daughters as the persons who are immediately to succeed to the Ranee; and their Lordships think that, viewing the will as a whole, when he uses the expression "except Mussummat Ranee Dhun Kowur aforesaid, none other is, nor shall be, my heir and malik," it may be fairly construed as meaning that she shall take a life-interest immediately succeeding him without that interest being shared by her daughters or by any other person.

On the whole, therefore, although undoubtedly there is some difficulty in construing this testamentary document, their Lordships are of opinion that the Indian Courts have been right in construing it as not giving an estate of inheirtance to the Ranee which she was able absolutely to alienate. If that be so, her daughters under this, will take after her, and the question has been raised whether they take as joint tenants or tenants in common. The High Court appears to suppose that they would take as joint tenants, but inasmuch as one of these daughters died before the testator, this question becomes immaterial, because in either case the plaintiff would be the heir and would be entitled to institute this action.

It follows that the Ranee could not convey to the defendant, who must be taken to have been a *bonâ fide* purchaser, having paid the full value (although he does not appear to have made any inquiries as to whether or not the Ranee did possess a power, unusual in Hindú ladies, of making a conveyance of an estate in fee simple), an estate beyond her own life, and that the plaintiff is entitled to a decree to the effect that after her death the property belongs to him.

But then comes the question as to what terms this decree in his favor shall be subject to. The Courts below in India were of opinion that he should only be entitled to recover the property after the Ranee's death on payment of the full purchase-money. The High Court varied the decree so far as to declare that he should be entitled to it upon the payment of a mortgage upon the property for Rs. 14,000 which appears to have been an existing mortgage at the time of the conveyance in 1854. A further question, however, has

[illegible] in the hands of the Appellants. The appellants say, that assuming this mortgage to have existed, and that there were some [illegible] due at the time of the conveyance to the [illegible] of the [illegible], that then the widow would be entitled to convey an absolute estate. Their Lordships cannot subscribe to the proposition as so stated.

They apprehend the law to be this: that Ranee Dhun Kower, who may be considered as very much in the position of a Hindu widow, might have sold the estate absolutely if it could have been shown (and the burden of showing this is upon the purchaser) that to convey such an absolute estate was necessary in order to pay the debts of the testator, and was for the benefit of the estate generally. In their Lordships' opinion there is no such proof whatever in this case. It appears that the testator possessed an income of somewhere about a lac of rupees, minus the Government revenue of Rs. 30,000, leaving him an income in round numbers of about 5,000*l.* per annum. He is shown at the time of his death to have owed a certain debt of Rs. 3,000 which was subsequently increased to 22,000, and was paid off in another way; therefore we have nothing to do with that. He is also shown to have owed a debt of Rs. 14,000 at the time of his death, that is 1,400*l.* A man with an income of 5,000*l.* a year is shown on his death to have owed a sum of 1400*l.*, and it is pretended that 16 years afterwards a necessity arises for selling a considerable portion of his real estate, to pay this debt of 1,400*l.*, plus some 400*l.* which had been subsequently contracted by the Ranee. The mere statement of these facts appears altogether to dispose of the contention that this estate could have been sold for the necessary purpose of paying the testator's debts, and when we add that both Courts have found that the fact was not so, their Lordships think it unnecessary further to dwell upon this point.

The only question that remains, then, is whether the plaintiff is entitled to the decree of the High Court as it stands, or whether he is entitled to it without the burden of paying off the Rs. 14,000. On the whole their Lordships are of opinion that the judgment of the High Court was right; that this mortgage of Rs. 14,000 subsisting upon the estate at the time of the sale, and having been paid by the purchaser, it is equitable that, when the plaintiff reclaims the estate, credit should be given to the purchaser for the payment

of the mortgage, which otherwise the plaintiff himself would have to meet.

For these reasons their Lordships are of opinion that the judgment of the High Court was right, and they will humbly advise her Majesty that the both appeals should be dismissed, and that there should be no costs. But in order to render the intention of the Court more clear, their Lordships will recommend that the following words be added to the declaration :—" And to be put in possession of the said property after the decease of Mussummat Ranee Dhun Kowur on payment to the said defendant of the sum of Rs. 14,000.

The appellant will have his costs of the application for leave to enter his cross-appeal paid out of the deposit; the remainder will be repaid to the appellant's agent.—S. W. R. Vol. XXII, p. 409.

CALCUTTA, H. C. A.—*The 18th of June* 1873.

Present:

The Hon'ble J. B. Phear and W. Ainslie, *Judges.*

Case No. 1115 of 1872.

Special Appeal from a decision passed by the Judge of Bhaugulpore.

MOTEE-RAM KOWUR (Defendant) Appellant,

versus

GOPAL SAHOO and another (Plaintiffs) Respondents.

A widow is not trustee for the heirs, but has the whole of the inheritance in her with a limited power of alienation; her power of alienating for spiritual purposes being larger than that to which necessity gives rise.

An alienation by a widow is not void by reason of inadequate consideration; but is voidable by the heir upon his offering to pay the real consideration, and on certain other conditions being satisfied.

Phear, J.—After giving consideration to this case, we are of opinion that the Rs. 900, the debt incurred for the Gya pilgrimage, and the Rs. 800, the debt incurred for the *shrád*, by the widow, were expenses to liquidate which it was within the power of the widow to

alienate her husband's property. They are of the nature of expenditure for the purpose of procuring spiritual benefit for the husband; and it has been laid down by the Privy Council, and the doctrine has been constantly followed by this Court, that the widow's power of alienation for spiritual purposes is larger than the power of alienation to which necessity gives rise. It has been long settled that she is not, in any proper sense, trustee for the heirs: she has the whole of the inheritance in her with a limited power of alienation, —a power of alienation which can only be exercised perhaps, we may say, in two classes of contingencies,—one class comprising cases of necessity, and the other class, cases of raising money for spiritual purposes.

In this view, it appears to us that the alienation was a good alienation, although it may be that the Rs. 17,00, which is the total of the two items to which we have referred, may have been an inadequate consideration for the sale: we suppose, indeed we must take it to have been an inadequate consideration, because the actual purchase-money was Rs. 4,000. Under these circumstances, the alienation is not void, but, as was expressed by the late Chief Justice in a case reported in IX, Weekly Reporter, page 108, is voidable by the heir upon his offering to pay the real consideration (in this case it would be Rs. 17,00) together with reasonable interest thereon; and upon the further condition, of course, that the defendant should account for the rents and profits during the interval over which he had been in possession, both the interest and the account of rents and profits to run from the date of the widow's death.

We think, therefore, that the decrees of both Courts below, which have been passed in favour of the plaintiff without any qualification whatever, are wrong decrees, and must be reversed.

The plaintiff has not in this suit expressed his readiness to repay the defendant any portion of the purchase-money, but has sought to recover the property unconditionally.

Under the circumstances, we think that the right order will be to dismiss the plaintiff's present suit leaving him to any future remedy if he has any right to it.

The defendant, appellant, must have his costs in all the Courts. S. W. R. Vol. XX, c. r. p. 187.

Held that none but the immediate reversioner is entitled to sue to interfere with the acts of a Hindú widow.

Held also that a petition presented by the immediate reversioner, when the suit was pending in special appeal, waving his rights in favor of the plaintiffs, in order to cure the defects of parties, could not be admitted at that stage.—*Gugun Chander Sein* and others v. *Joy-doorga* alias *Goluck-basee* and others.—S. D. A. Decis. for 1859, p. 620.

A reversioner can during the life-time of the alienor, commence a suit to declare that a conveyance is not binding upon him beyond the life of the alienor.

A deed of conveyance by a Hindú widow is an act hostile to, and invades, a reversioner's rights, and as such warrants his suing for a declaratory decree.—*Shewuk Ram-persad* versus *Mohomed Shomsool Huda* and another.—S. W. R. Vol. XII, p. 26.

A decree in a suit brought for a zemindary by a Hindú widow, binds those claiming the zemindary in succession to her. Unless the decree can be successfully impeached on some special ground, it will be an effectual bar to any new suit by any person claiming in succession to her. For, assuming her to be entitled to the zemindary at all, the whole estate would, for the time, be vested in her, absolutely for some purposes, though, in some respects, for a qualified interest, and, until her death, it could not be ascertained who would be entitled to succeed.—*Kattama Nauchiar* v. *The Rajah of Shivagunga*.—Sutherland's Privy Council Judgments, page 520. Moor. Ind. App. Vol. IX, p. 539.

Held following a Full Bench case cited that a reversioner can maintain a suit during the life-time of a childless Hindú widow to set aside a deed of conveyance as inoperative on the death of the widow by whom it was granted.—*Lalla Chuttur Narain* v. *Mussummat Wooma Koonwaree* and others.—S. W. R. Vol. VIII, page 273.

A reversioner has no right of suit during the life-time of a widow to set aside a deed of alienation said to have been executed by his ancestor and supported by the widow.—*Mussummat Ram*

Bunsee Koonwar v. *Mussummat Moheshur Koonwar.*—S. W. R. Vol. I, p. 538.

Held that a daughter was competent to sue during the life-time of her mother, the encumbrancer; the daughter being the immediate reversioner to the property, and her reversionary right being seriously threatened.—*Mussummat Golab Koonwur* v. *Shib Suhae* and others.—Agra. Rep. Vol. I, p. 55.

Where it appeared that there were other persons nearer than plaintiff, and there had been no disclaimer of their right on their part,—*Held* that plaintiff, who, according to the ordinary Hindú law of inheritance, was not the next heir, could not maintain the suit.—*Goshaeen Teekumjee* and others v. *Pursotum Lalljee* and others.—Agra Rep. Vol. IV, p. 238.

Although a suit to set aside an alienation, alleged to have been illegally made by a Hindú widow, of property belonging to the estate of her deceased husband, should usually be brought by the next, and not by a remote, reversioner, yet such a suit may be brought by other than the next reversioner where it can be considered as one brought by a person who, by express declaration of those who having prior rights, was entitled to maintain it by their consent, and of their relinquishment in his favor of the right of suit.

When this relinquishment is once shown, the suit is open to no objection on the score of its having been instituted without the plaintiff, at the time of the institution, having shown that the prior rights of others had been waived or abandoned in his favor.—*Amur Singh* v. *Murdun Singh.*—N. W. Rep. Vol. II, p. 31.

Although an alienation of property by a widow for other than allowable purposes may be declared void, yet the reversioners are not entitled to immediate possession unless the widow has committed some act involving forfeiture of property.—*Mussummat Kissore* v. *Khela Ram.*—N. W. R. Vol. II, p. 424.

Though a reversioner cannot obtain possession during the life-time of a Hindú widow, yet he may be entitled to a declaration whether the alienations made by the widow are or are not valid and

binding on the absolute heir. If the reversioner can prove that wilful default is about to take place, he will be entitled to such relief from the Court as will prevent the apprehended occurrence of a sale for arrears.—*Surut Chundar Sein* v. *Muthoora-nath Pudatick.*—S. W. R. Vol. VII, p. 303.

Where transfer is made by a widow in fraud of the rights of the presumptive reversioner—*Held* that he is entitled to a declaratory decree, that the widow's act is null and void, as it may affect the interests of the reversioner, and for provision, if necessary, to prevent any waste of the estate by the appointment of a receiver, but not to a more extensive remedy. His reversionary interest is not accelerated by the transfer. Where a daughter was colluding with the widow in making transfer of divided property—*Held* that plaintiffs, the next reversioners after the daughter, were competent to maintain the suit to have the transfer declared null and void.—*Jwala-nath* and others v. *Kulloo* and others.—Agra. Rep. Vol. III, p. 55.

When the immediate reversioner is in possession of a part of the property, and not in a position to institute proceedings to set aside alienations, the next reversioner is entitled to sue to protect his future rights.—*Bal-gobind Ram* v. *Hirusranee.*—S. W. R. Vol. II, p. 255.

A reversionary heir to his uncle's property may sue, during the life-time of the widow for a declaratory decree to the effect that an alienation will not bind him in the event of his surviving the widow.—*Bykunto Nath Roy* v. *Grish Chunder Mookerjee.*—S. W. R. Vol. XV, c. r. p. 96.

A, brought a suit against C and D, alleging that he was an heir-expectant upon the death of B, a Hindú widow in possession of an estate, and, as such sought to have a declaration of title, and to have certain conveyance of this estate, said to have been executed by C, in favor of D, set aside as affecting A's future interest, without charging any act of waste or injury to the property which might affect his rights as reversioner. *Held* that A, had disclosed no cause of action against C and D.—*Mussummat Sooruj Bunsi Koonwur* v. *Mahiput Singh.*—B. L. R. Vol. VII, p. 669.

Declarations of title may be granted to reversioners, and alienations by a Hindú widow set aside during the widow's life-time, although possession of the estate itself will not be ordinarily given. *Mussummat Shibo Koeree* and others v. *Joogun Shingh* and others. S. W. R. Vol. VIII, p. 155.

In a suit by a reversioner to set aside a sale of property made by a Hindú widow, the court cannot direct possession to be given to the reversioner, but can only declare the sale to be invalid, and leave the widow or her vendees as her tenants in possession.—*Goluck Chunder Dass* v. *Gopal Kishen Sein.*—S. W. R. for 1864, page 250.

A reversioner cannot sue to dispossess a widow or a purchaser holding under her, though he is entitled to sue for a declaration that a sale by the widow is invalid against him on his proving that the sale was made without legal necessity.—*Hara-dhun Nag* v. *Issur Chunder Bose.*—S. W. R. Vol. VI, p. 222.

A reversionary heir has no right to set aside a deed of sale executed by a Hindú widow during her life-time.—*Ram-monohur Singh* and others v. *Kooldeep Narain Singh* and another.—S. W. R. Vol. XI, p. 514.

A reversionary heir is subject to all rights which exist against the property in consequence of acts done by, or decrees obtained against, the ancestor.—*Ram-monohur Singh* and others v. *Kooldeep Narain Singh* and another.—S. W. R. Vol. XI, p. 515.

Suit by a reversioner to set aside an alienation is cognizable if the title of the reversioner has been injured by a distinct act of alienation, and if the widow who ought to have brought the suit has relinquished her life-interest, and signified her assent to the suit proceeding.—*Bheem-ram Chukerbutty* v. *Huree-kishore Roy.* S. W. R. Vol. I, p. 359.

A party, who subject to the life-interest of his mother has a real and vested interest in remainder such as a Hindú has the power of creating, has a right to sue to obtain a declaration of the invalidity of a will set up to his prejudice, which purports to take away altogether his future right and interest in the property.

Anund-mohun Mullik versus *Indra-monee Chowdhrain.*—S. W. R. Vol. XVI, c. r. p. 214.

Relative to Purchasers, &c.

CALCUTTA, H. C. A.—*The* 21*st of December*, 1864.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Puisne Judges.*

WOOMA CHURN BANERJEE (Plaintiff) Appellant,

versus

HARADHUN MOJOOMDAR and others (Defendants) Respondents.

The plaintiff's cause of action, as reversioner, held to accrue from the death of his grandmother who had the life interest.

Held also that the purchaser from the grandmother was bound to prove his title deeds and the existence of legal necessity for the sale.

In this case plaintiff sued for possession of certain brohmoter lands, gardens, tanks, &c. Plaintiff's allegation is that "the entire property left by the plaintiff's maternal grandfather and maternal uncle, devolved on his grandmother Ram-koomaree." Plaintiff adds that "he attained his majority in 1260, and after the death of his maternal grandmother Ram-koomaree, he attempted to take possession of the estate as he is lawfully entitled to it, but the defendants opposed him and did not deliver over possession to him." The gist of the answer of all the defendants is that they have possession; that plaintiff never had any; that they hold under various titles, and that plaintiff must show a superior title in order to justify his obtaining a decree.

It is clear that the plaintiff's contention was that, even if the defendants had possession as the Ameen reported, still, as the Ameen had also reported that the defendants did not produce their title deeds, and had stated that in some cases the defendants claimed from the grandmother, the burden was on them, defendants, as purchasers, to prove their own title deeds, and also the legal necessity under which they purchased, before they could have any

right under Hindú law in preference to the heir at law, as which plaintiff clearly all along claimed. The case has, in no way, been tried on this view. We therefore remand it that this may be done, and we take the opportunity to call the attention of the lower Court to the views expressed by Her Majesty's Privy Council in Volume VI of Moore's Indian Appeals, page 424. "Their Lordships think that the lender is bound to enquire into the necessities for the loan, and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate, but they think that if he does so enquire and act honestly, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge, and they do not think that under such circumstances he is bound to see to the application of the money.* Their Lordships do not think that a *boná fide* creditor should suffer when he has acted honestly and with due caution, but is himself deceived."—S. W. R. Vol. I, a. c. pp. 347—349.

It is argued in special appeal that the mere declaration of necessity was sufficient to justify the purchaser proceeding to buy. But this is not so. It is not necessary for the purchaser to see application of the purchase-money, but he must make such enquiries as an ordinary prudent man would in the transactions of life to satisfy himself of the reality of a fact, such as the existence of a legal necessity in this case.—*Gunga-gobind Bose* and others v. *Sreemutty Dhunnee* and *Ramee*.—S. W. R. Vol. I, c. r. p, 60.

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* It is a mistake to suppose that the *dicta* in the case of Hunooman Persad Panday (*i. e.*, in the case above cited) apply only to alienations effected by guardians of minors. They lay down the general principles by which the courts are to be guided, in dealing with suits in which it is sought to set aside alienations made by persons having a limited or qualified power over the estates they have alienated.

These are that—"the power of alienation can only be exercised rightly in case of need, or for the benefit of the estate, but, where the charge is one that a prudent owner would make in order to benefit the estate, the *boná fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it in the particular instance is the thing to be regarded. If the lender inquires into the necessity for the loan and acts honestly, satisfying himself that the manager is acting in the particular instance for the benefit of the estate, the real existence of a sufficient necessity is not a condition precedent to the validity of his charge on the estate, nor is he bound to see to the application of the money."—Remarks by the late Sudder Dewany Adawlut of Calcutta in the case of *Deotaree Mohapatter* and others v. *Damoodur Mohapatter* and others. *Vide* S. D. A. Decis. for 1859 p. 1643.

A party claiming immovable property by virtue of an alienation by a Hindú widow during her son's minority is bound, whether he be a plaintiff or a defendant, to prove that he made reasonable inquiry, and he in good faith believed that such circumstances existed as would justify the widow in alienating her son's estate.—*Kashi-nath Seeta-ram Oze* v. *Dakhi et al.*—Bom. H. C. Rep. a. c. j. Vol. VI, p. 211.

Where a purchaser of immovable property deals with a person having a qualified power of dealing with that property, it lies upon the purchaser to give some reasonable account of the need which actually existed, or was alleged to exist, for the sale.—Mad. H. C. Rep. Vol. II, p. 407.

In purchasing from a Hindú widow the purchaser is not bound to look to the appropriation of the money, nor is he affected by the fact that the alienation was made for a larger sum than the necessity of the case required.—*Kamikha Prosad Roy* v. *Srimati Jagadumba Dasi.*—B. L. R. Vol. V. p. 508.

Where a considerable time has elapsed of enjoyment and apparent acquiescence, a purchaser, or one claiming through him, may be absolved from showing any more than the fact of the sale being made to him under some ostensible plea of necessity.—*Madhob Chunder Hajra* v. *Gobind Chunder Banerjee* and others.—S. W. R. Vol. IX, p. 350.

The purchaser from a Hindú widow who is still living is entitled to possession of the property sold, whether there was necessity for the sale or not.—*Bogooa Jha,* v. *Lall Doss.*—S. W. R. Vol. VI, page 36.

Purchase from a Hindú widow is invalid, but the purchaser may remain in possession during the widow's life-time, on proof of his purchase being preferable to an alleged gift made by the widow to the defendant.—*Chunder-nath Surma,* v. *Roma-nath Surma.*—S. W. R. Vol. I, p. 69.

Where the legal necessity for a sale by a Hindú widow is questioned, its existence must be shown by the party standing on

the conveyance.—*Bisso-nath Roy* and others v. *Lall Bahadoor Singh* and others.—S. W. R. Vol. I, c. r. p. 247.

In a sale by a Hindú widow under necessity where the Vendee pays a fair price, and acts *boná fide,* the mere fact of only two-thirds of the purchase-money being paid to creditors does not invalidate his conveyance, as he is not bound to see to the application of the purchase-money.—*Ram Gopaul Ghose* v. *Bul-deb Bose.*—S. W. R. for 1864, p. 385.

The first duty of a purchaser from a Hindú childless widow is to satisfy himself as to her right to sell. If he does not act with due care and attention in the matter, he cannot be said to have acted legally in good faith, although he may have believed or taken for granted that all was right.—*Ram-dhone Bhuttucharjee* v. *Ishanee Debee.*—S. W. R. Vol. II, p. 123.

A purchaser for value is not bound to prove the antecedent economy or good conduct of a Hindú widow who alienates a portion of her husband's estate, nor to account for the due appropriation of the purchase money, but is bound to use diligence in ascertaining that there is some legal necessity for the loan, and he may be reasonably expected to prove the circumstances connected with his own particular loan.—*Kali Koomar Chowdhry* v. *Nund Koomar Chowdhry.*—S. W. R. for 1864, p. 153.

Where a Hindú widow raises money by mortgaging her husband's property, the mortgagee is not bound to look to the appropriation of the money so raised, his responsibility ceasing when he has satisfied himself that there was legal necessity for the loan.—*Ram Persad Singh* v. *Mussummat Nag-bungshee Kooer.*—S. W. R. Vol. IX, p. 501.

The existence of a decree which may be executed at any time against ancestral property is a clear legal necessity for contracting a loan, and justification to any one lending money on the mortgage of the property.—S. W. R. Vol. XI, p. 446.

Miscellaneous Cases.

CALCUTTA H. C. A.—*The 12th of July* 1869.

Present:

Mr. Justice Kemp and Mr. Justice Glover, *Judges.*

MUSSUMMAT INDU-BANSI KUNWUR (Plaintiffs,)
versus
MUSSUMMAT GRIBHIRUN KUNWUR and others (Defendants.)

A Hindú of Tirhoot died in 1849, leaving two widows and a brother. A compromise was made by the three, whereby they agreed that the brother should remain in possession of the property left by the deceased; and that some land should be assigned to the widows for maintenance. The elder widow died in 1867, and the other sued the heirs of the brother for recovery of possession of the property. The defence set up was that the suit was barred by limitation, as her cause of action arose not on the death of her co-widow, but on the death of her husband.

Held, that as to recovery of possession of a moiety of the property, the cause of action arose on the death of the co-widow.

That the possession of the elder widow was not adverse to the younger widow, as the elder widow was permitted to enjoy the possession of the husband's property during her life-time, the younger widow receiving an allowance from the profits of the estate.—B. L. R. a. j. Vol. III, pp. 289—290.

Where certain landed property in the possession of a Hindú widow was sold on the alleged ground of necessity, and the execution of the deed of purchase attested by the then next heir, it was held that the assent implied in such attestation was not conclusive in law as to the necessity for sale, though the fact of the persons most interested in contesting such a sale being called in to execute the deed is the strangest possible proof of good faith on the part of the purchaser.—*Madhob Chunder Hajrah* v. *Gobind Chunder Banerjea.* S. W. R. Vol. IX, p. 350.

A Hindú widow has power, with the consent of the reversionary heirs, to make a valid alienation, for religious purposes, of property, movable or immovable, left by her husband.

Where a Hindú widow dedicated property by a deed to the worship of an idol, and the property was given to trustees in trust, after the death of the widow, to permit the male heirs of her late husband to receive the rents, *held*, that such heirs were entitled to actual possession and to the rents of the estate, provided they devoted it acording to the provisions of the deed to the worship of the idol.—*Braja-nath Baisakh* versus *Matilal Baisakh* and another.—B. L. Rep. Vol. III, o. j. c. p. 92.

Where only the rights and interest of the widow in the property left by her husband were sold in execution of a decree against her on account of debt contracted by her, and neither the decree nor the sale proceedings declared the property itself liable for the debt—*Held* that the purchase conveyed an interest in the estate only during the widow's life-time.—*Kisto-moyie Dossee* and others, v. *Prosunno Naraen Choowdhoory* and others.—S. W. Vol. I, p. 303.

In re Joy-naraen Bose—It was held that a widow's interest may be sold in execution for her debts.—Sev. Rep. Vol. IV, p. 781.

See *in re Rash-beharee Bose.—Ibid.* Vol. V, p. 537.

A lender in good faith lent money to save the widow's estate from sale, on security of a bond and mortgage. The present possessor, though not succeeding as heir, is liable to the extent of the security, if the widow acted for the benefit of the estate and under necessity.—*Hur-nath Roy Chowdhoory* v. *Inder Chander Baboo.*—S. D. A. R. for 1859, p. 207.

When a party does not sue as an heir of a Hindú widow or her husband to set aside a sale by her on the ground of illegality under the Hindú law, but sues as a decree-holder to have the same set aside as fraudulent, he cannot raise the question of necessity.—*Kissen Bullub Mahtab* v. *Roghu Nundan Thakoor* and others.—S. W. R. Vol. VI, p. 305.

Suit by a widow for possession of her husband's share of joint property inherited from his grandfather. *Held* that if the husband died before his grandfather, she had no title; but that if he had outlived his grandfather, his widow would be entitled to his share on

proof of her having lived in commensality with the defendant within 12 twelve years from the dates, of her dispossession.—*Bindu Basini Dassee* v. *Anund Chunder Paul.*—S. W. R. Vol. II, p. 179.

Where a Hindú widow mortgaged immovable property to one person, and afterwards gave it in gift to another—*Held*, that the deed of gift did not convey to the donee the widow's equity of redemption.—*Jagan-nath Vithal* v. *Apaji Vishnu.*—Bom. H. C. Rep. Vol. V, p. 217.

On the death of a Hindú (who had been separated from his brothers), and during the life-time of his widow, his brothers' sons having claimed as his heirs and obtained mutation of their names on the Collector's rent-roll:

Held, that under the Mitákshará (under which the case came) the widow succeeds, the act of the nephews was hostile to her, and their possession for more than 12 years was adverse possession barring her claim.

Held also that if a widow without fraud or collusion, would be barred, the reversioners claiming to succeed on her death would also be barred.—*Gopal Singh* v. *Kunhya-lall Sahib-zadah.*—S. W. R. Vol. XI, p. 9.

That a Hindú widow, entitled to her husband's share in the joint property continues to live in the family and mess with them; is sufficient, in the absence of evidence to the contrary, to show that she is receiving payments on account of her share.—*Gobind Chunder Bagchee guardian of Ek-cowree* alias *Kali-kisto Bagchee* minor v. *Kripa-moyee Debea.*—S. W. R. Vol. XI, p. 338.

Held that, as the respondent had given all title to monies due to her husband in favor of the appellant his other wife, she could not be held equally liable for her husband's debts. The order of the lower Court, dismissing the appellant's claim to recover money from the defendant (respondent) as jointly liable with her for their husband's debts, confirmed.—*Mussummat Radha Koonwur widow of Chintamun Awustee* v. *Doorga Koonwur, widow of Chintamun Awustee.*—S. D. A. Decis. for 1859, p. 1195.

When the amount of a judgment debt was due from two brothers A., and B., and the widow of A., in order to save her husband's

estate from sale in execution, gave a bond making herself responsible for the whole debt, and after her death, the judgment creditor sought to recover the amount from the heirs of A, it was held that the widow had no authority to settle for B,'s share of the debt as well as for her husband A, nor could she make her husband's estate liable for it; that plaintiff had made a mistake in taking a bond only from the widow, and as it did not make her and B, jointly and severally liable, A's heirs could not be held responsible for the debt of B, and that plaintiff must fall back on his original decree and execute it.—*Mussummat Ram Doolary Koonwur* and *Juggun Singh* v. *Sheo Shunker Singh* and others.—S. D. A. Decis. for 1860, page 502.

A reversioner cannot during the life-time of a Hindú widow sue to set aside a sale made by her if 12 years have elapsed since the date of the sale, though he may during her life-time sue to have the sale declared void and to prevent waste. Such limitation does not affect the right of suit of the reversioner after the widow's death when he succeeds as heir.—*Subodara Bibee* v. *Mohendro Nath Bose.*—S. W. R. Vol. II, p. 271.

A *putnee* lease granted by a widow while in possession is not invalidated by the fact that her equity suit is pending at the time.—S. W. R. Vol. XI, p. 554.

Where a Hindú widow alienates land while in her possession without a legal necessity, the *putneedar* acquires only her life interest, but if there was a legal necessity, then the purchaser of her husband's right and title is subject to the *pottah* granted by her.—S. W. R. Vol. XI, p. 554.

The *onus* of proving the necessity for a sale by a Hindú widow and the adequacy of the purchase money lies on the purchaser.—*Jodu Nath Sircar* and another v. *Sreemutty Sonamonee Dossee* and others. Cor. Rep. p. 70.

A widow re-marrying is entitled to succeed to the estate of her son by a former marriage, and Section 2 of Act XV, of 1856 does dot deprive her of any right or interest which she had not at the time of re-marriage.—S. W. R. Vol. XI, p. 82.

When a childless Hindú widow is the heiress and legal representative of her husband, the reversionary heirs are bound by decrees relating to her husband's estate, which are obtained against her without fraud or collusion; and they are also bound by limitations by which she, without fraud or collusion, is bound.

The words "cause of action" in Act XIV, of 1859, refer, not to a new cause of action accruing to the reversionary heir personally, but to the cause of action which accrued to the heir or representative, for the time being, of the deceased.

When alienations of her husband's estate are improperly made by the widow, they are good as against her for her life, and the reversionary heir's cause of action does not accrue until her death. But when property belonging to the husband's estate is held adversely to the widow and never reaches her hands, the cause of action accrues to her, and a suit, whether by her or by the reversionary heir, must be brought within the usual period, counting from the commencement of the adverse possession.*—*Nobin Chunder Chuckerbutty* (Plaintiff) Appellant, v. *Issur Chunder Chuckerbutty* and others (Defendants) Respondents.—S. W. R. Vol. IX, F. B. page 505.

In a suit by the sons of the reversionary heir of a Hindú ancestor to recover property sold by his widow fifty years ago to the defendant's predecessors, the Court—considering the unreasonableness of expecting direct evidence of legal necessity for the alienations in question after so great a lapse of time, the adequacy of the consideration given by the purchasers, the due registration and publication of deeds 50 years old and containing a recital of legal necessity, the proved knowledge of the alienations at the time they were made by the *then* reversionary heir, his conduct and silence up to the time of his death, or for nine years after the widow's death when the succession opened out to him, and the delay made by his son in bringing this suit—held the defendants entitled to a strong presumption in their favor, which had not been rebutted by the plaintiffs that their predecessors had purchased the estates in question after a due enquiry, and after satisfying themselves in

* This doctrine has been adopted by the Privy Council.

good faith of the existence of a legal necessity for the sale thereof.—*Chowdhry Herasutoollah* v. *Brojo Soonder Roy* and another.—S. W. R. Vol. XVIII, p. 77.

A suit to recover principal and interest on a bond executed by a Hindú widow whilst possessed of her late husband's property, cannot be brought at her death against his reversionary heirs on the ground of some supposed equity arising out of the possession of the estate by the defendants, obliging them to pay a portion of the money which was expended in recovering it.

There is no necessity for a widow to borrow money when she has an income to pass the expenses of litigation.

In order to establish a binding promise by the defendants' father to pay the bond, there must be proof of a consideration for such a promise.—*Roy Mukhun Lall* v. *Mr. W. Steward* and others. S. W. R. Vol. XVIII, p. 121.

Alienations made by Hindú widows of shares of an estate held as a hereditary *mocurruree* tenure, can only be contested by reversionary heirs and other persons having some interest in the estate; it is not open to the zemindar or superior landlord to object to such alienations. If the reversionary heirs make no arrangement for the due payment of the *mocurruree* rent the only right which the zemindar has, is to sue them for arrears, and to cause the sale of the tenure, if necessary, in execution of the decree, but not to take *khas* possession of it by force.—*Ram Dhan Shaha* and another v. *Rajah Rajkristo Singh Bahadoor.*—S. W. R. Vol. XVIII, p. 406.

Where a widow having lost her rights in her husband's estate on account of remarriage under the provision of Section 2, Act XV of 1856 was allowed to retain possession by the next reversioner—Held that such arrangement by the next reversioner was only binding upon him, and not on the heirs of such reversioner, who on the death of the former were entitled to sue for possession of the property by dispossessing the widow.—*Kaisho* and others v. *Mussummat Jumna.*—Agra Rep. Vol. I, a. c., p. 140.

Where a Hindú widow, exceeding her rights, alienates property which a reversioner claims, his suit is not barred if brought within

12 years from her death.—*Gopal Chunder Mullick* v. *Onoop Chunder Roy* and others.—S. W. R. Vol. XI, p. 183.

The rights of a reversioner entitled to succeed on the death of a childless Hindú widow if he shall happen to survive her, could not be sold in execution of a decree of Court.—*Koraj Koonwar* v. *Komul Koonwar and others.*—S. W. R. Vol. VI, p. 34.

Raj Chunder Dass, a Hindú, died possessed of property, leaving as his heiress, his widow, Ross-monee Dossee. He also left four daughters two of whom died in the life-time of their mother, each leaving a son. Ross-monee Dossee died leaving her surviving two daughters, Puddo-monee Dossee, and Jugdumba Dossee, who succeeded to the estate of Raj Chunder Doss. *Held* that Thakoor Doss Biswas one of the sons of Jugdumba Dossee has no such interest in the property as could be attached and sold in execution of a decree against him.—*Bhoobun Mohun Banerjee* v. *Thakoor Doss Biswas.*—Indian Jurist, Vol. II, N. S., p. 277.

Reversionary interest may be sold in execution of a decree. *Gour-hurree Dutt* v. *Radha Gobind Shaha.*—S. W. R. Vol. XII, page 54.

The mere execution and registration of a deed as between strangers, without any ulterior act directed against a Hindú widow in possession, or against the reversionary heir or his possession, can not give the latter any cause of action or entitle him to ask for a declaratory decree.—*Sooruj-bunsi Koonwur* v. *Mohi-put Singh.*—S. W. R. Vol. XVI, p. 18.

The possession in right of inheritance of a widowed daughter having sons alive is not adverse to a reversioner.—*Poorun Chunder Nundee* v. *Sreesh Chunder Chukerbutty.*—S. W. R. Vol. XV, c. r, page 147.

A reversioner obtained a decree declaring that he was then the nearest heir to certain ancestral property, and would be entitled to succeed on the death of the widows of his cousin who were in possession. After the death of the widows, it was found that the reversioner had become insane, and was therefore incapacitated by Hindú law from inheriting. Upon this his son, who had been ap-

pointed manager on behalf of his father under Act XXXV of 1858, applied for execution of the above mentioned decree as his representative. *Held* that it was necessary to look to the status of the heir at the time the succession opened out to him, and that the applicant in the capacity of the representative to the reversioner (who was not the heir of the widow's husband), was not entitled to execute the decree.—*Brijo Bhookun Lall* v. *Bechun Dobey*.—S. W. R. Vol. 14, c. r. p. 329.

Limitation reckons against the reversioners or next heirs of a deceased person only from the death of the widow or the immediate heirs of the deceased.—*Gri-dharee Singh* v. *Mussummat Indro Kooer*.—S. W. R. Vol. XVII, c. r. 237.

Admitted Legal Opinions.

According to the Hindú law as current in Benares, the widow will succeed to the exclusion of the brother, if the estate was divided; but if undivided, the brother will exclude her; and the brother in either case excludes the brother's sons.

Q. Rajah Bhuwa-bul Deo died leaving four sons, namely, Baboo Iswari Buksh Deo, Baboo Dil-gunjun Deo, Baboo Ahlad Singh, and Baboo Soobh-nath Singh, of whom the eldest (Baboo Iswari Buksh Deo) died, leaving a minor son and two widows, the elder called Ranee Sheo-raj Koonwur, and the younger Ranee Ahbeeman Koonwur, and subsequently the minor died. Ahlad Singh died, leaving Huruk-nath and Joy-nath as his sons and representatives; lastly, Dil-gunjun Deo died childless, leaving a widow called Ranee Golab Koonwuree; and Soobh-nath is still living. In this case, whether will the property left by Dil-gunjun Deo, devolve on his widow Golab Koonwuree, on his brother Soobh-nath, or on his brother's sons Huruk-nath and Joy-nath?

R. Supposing Dil-gunjun to have left neither son, son's son, nor son's grandson at his death, but to have been survived by his widow Golab Koonwuree, his brother Soobh-nath Singh, and his brother's two sons Huruk-nath and Joy-nath, his widow is alone entitled to succeed to his real and personal estate, provided it be divided. If Bhuwa-bul Deo died leaving four sons, Iswari Buksh,

Dil-gunjun, Ahlad, and Soobh-nath, and his estate was undivided, then the uterine brother Soobh-nath is entitled to inherit the portion to which his late brother Dil-gunjun was entitled, whose widow has a right to demand food and raiment only until her death. This opinion is conformable to the Mitákshará and other law tracts which are current in the Western provinces.

Authorities.

"The wife and the daughters, also both parents, brothers likewise, and their sons, gentiles, cognates."—*Yájnyavalkya,* cited in the Mitákshará.

"The wealth of him who leaves no male issue, goes to his wife; on failure of her, it devolves on daughters; if there be none, it belongs to the father; if he be dead, it appertains to the mother; on failure of her, it goes to the brothers; after them, it descends to the brother's sons."—*Vishnu,* cited in the same authority.

"The rule, deduced from the texts (of *Yájnyavalkya,* &c.,) that the wife shall take the estate, regards the widow of a separated brother."—*Mitákshará.*

Menu:—"To the nearest kinsman (*Sapinda*), the inheritance next belongs."

Sudder Dewanny Adawlut, 10th May 1824.—Baboo Hurperkash Singh, v. *Baboo Dil-gunjun Deo.*—Macn. H. L. Vol. II, Chap. I, Sect. ii, Case 5.

The claimants being a brother's son and a widow, the former will take the property, if the family was joint; but the latter if separate, according to the law of Benares.

Q. An individual had two sons, A and B. The eldest (A) died before his father, leaving a son and a widow. Subsequently the father died, leaving a family consisting of B and his wife, and A's son and widow; and at his death he also left some landed property. Some time after this, the son (B) died, leaving his widow, and his brother's son and widow him surviving. In this case, what proportions of the property of B will respectively devolve on the eldest son's son and widow, and on the younger son's widow?

R. If A's son, his widow, and the widow of B, lived together as a joint family at the time when B died; according to law, A's

son is alone entitled to the estate, but it is necessary for him to provide B's widow with food and raiment equal to her condition of life. If they formerly lived apart, and the share of B was separated, then his widow is entitled to the property which fell to her husband's legal share. A's widow has no right of succession, but she must be provided by her son with proper maintenance.

Zillah Moradabad.—*Doorga-persaud* v. *Khuma* and another. Macn. H. L. Vol. II, Chap. I, Sect. ii, Case 10.

An unchaste widow forfeits all right to her late husband's property.

Q. A person died, leaving a widow and a brother of the half blood. Subsequently to his death, the widow violated the hitherto unsullied bed of her husband, and had a child by a paramour of another class, while the brother's conduct was consistent with his religion; in this case, which of the two is entitled to succeed to the property of the deceased? Supposing the widow during the life-time of her husband to have co-habited with a stranger, and to have therefore been expelled from the family, and to have lost her reputation, has such widow any right to inherit her husband's property?

R. It is the general doctrine, that the virtuous widow of a man who dies leaving no heir down to the great-grandson, succeeds; but that if she, on the death of her lord, be faithless to his bed, she has no right of succession: consequently the widow in such case would be excluded by her husband's half brother. So in the case of her having acted unchastely while her husband was living. The authorities for this opinion are laid down in the *Dáya-bhága* and other books of law.

Authorities.

Vrihaspati:—"If her husband die before her, she shares his wealth. This is a primeval law."*

Katyáyana:—"Let the widow succeed to her husband's wealth, provided she be chaste." "The childless wives, conducting themselves aright, must be supported; but such as are unchaste, should be expelled; and so indeed should those who are perverse.†"

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* *Dáya-bhága*, 159.

† Mitákshará, 363.

Vrihat Menu:—"The widow of a childless man, keeping unsullied her husband's bed, and persevering in religious observances, shall present his funeral oblation, and obtain (his) entire share."

Náreda:—"But a wife, who does malicious acts injurious to her husband, who has no sense of shame, who destroys his effects, or who takes delight in being faithless to his bed, is held unworthy of the property before described."

Zillah Hooghly.—Macn. H. L. Vol. II, Chap. I, Sect. ii, Case 3.

An unchaste widow may be expelled from her husband's house.

Q. There were two brothers, of whom one died, leaving sons, who are still alive; and the other died leaving a son, who also died, leaving a widow, him surviving. The widow had become a prostitute, and had violated her husband's bed. In this case, is she entitled to inherit her husband's estate, and if not, on whom does his property devolve?

R. If it be proved that the widow in fact did not keep her husband's bed unsullied, she has no title to his property, and ought to be expelled from his house. His estate, in default of heirs down to the uncle, should devolve on his uncle's sons. This opinion is in conformity to the authority contained in the *Dáya-bhága, &c.*

Zillah 24-Pergunnahs, 18*th July* 1811.—Macn. H. L. Vol. II, Chap. I, Sect. i, Case 4.

A widow cannot inherit property left by her husband's relatives or their widows.—Macn. H. L. Vol. II, Chap. I, Sect. ii, Case 11.

A man dying and leaving three widows, who inherited his property, on the death of one of them without issue, the two others will take her share.

Q. A Hindú inhabitant of Patna died, leaving three wives him surviving. Of these three, the first was childless; the second had three daughters, and the third had one daughter. Under these circumstances, on the death of the childless wife, to whom does her share of the property legally belong, and who is entitled to claim it, according to the law as prevalent in that part of the country?

R. If a Hindú inhabitant of Patna die, leaving three wives; the first childless, the second having three daughters, and the third

one daughter, of whom the childless one died, in this case, the surviving two widows of her husband are entitled by law to her share of the property, and to sue for the same; because, although a widow succeeds to her husband's property in default of male issue, yet, on her death, it goes to her husband's nearest heirs, and in this instance his nearest heirs, in default of son, grandson, and great-grandson, are his widows. This is the law according to the *Mitákshará*, *Víra-mitrodaya*, *Vyavahára-mayúkha*, *Vyavahára-koustubha*, and other authorities current in Patna, and the adjacent places.

Authorities.

"The childless widow, preserving inviolate the bed of her lord, and strictly obedient to her spiritual parents, may frugally enjoy the estate until she die; after her the legal heirs shall take it." *Kátyáyana.*

The wealth of him who leaves no male issue, goes to his wife; on failure of her to his daughter, &c.—*Vishnu.*

A wife, daughters,* &c.—*Yájnyavalkya.*

Sudder Dewany Adawlut, July 12th 1827.

Doonda Singh, Appellant v. *Mussummat Doorga Koonwur.* Macn. H. L. Vol. II, Chap. I, Sect. ii, Case 15.

Property acquired without using the patrimony by one brother living in partnership, belongs to him exclusively.

After his death it goes to his widow, who has, however, no right to dispose of it; and after her death, it devolves on his brethren.

Q. 1. A Hindú acquires landed property by means of his own funds or by means other than those of the joint funds, at a time when he is living in partnership with his brethren. Do such land after his death go to his undivided brethren, or to his widow? If they go to his widow has she or has she not a right to dispose of them by sale or gift; and, if she has not a right to dispose of such

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* The case stated is that of a widow dying childless, and being survived by two other widows of her husband, each of whom had issue; but it would have been the same had the deceased widow been the mother of a daughter or daughters; the property going at her death to the nearest heirs of her husband, who are in this instance his wives and not his daughters. But all the daughters would inherit equally on the death of all the three widows.—Note by Sir W. Macnaghten.

lands by sale or gift, to whom will they devolve after the death of the widow? To her husband's heirs, or to whom?

R. 1. A Hindú acquires landed property by means of his own funds, or by means other than those of the joint funds, at a time when he is living in partnership with his brethren, Under these circumstances, such lands are not divisible, among his brethren. After his death, therefore, the right to them will be vested in his widow, and not in his undivided brethren. But in such case, the widow has no right, without the consent of her husband's heirs, to dispose of the lands so devolved upon her from her husband by sale or gift, and after the death of the widow, the right to such landed property will be vested in the heirs of her husband. This opinion is delivered in conformity to the *Viváda-chintámani*, the *Vivåda-ratnákara*, the *Vyavahára-chintámani*, and other authorities current in Tirhoot.

Authority.

1*st.* What a brother has acquired by his labour, without using the patrimony, he need not give up without his assent; for it was gained by his own exertion. Texts of *Menu* and *Vishnu* cited in the *Vivåda-chintámani*, *Vivåda-ratnákara*, and other authorities.

2*nd.* That which is acquired without detriment to the joint-stock, belongs exclusively to the acquirer.—Interpretation of the text in the *Vivåda-chintámani*.

3*rd.* Property acquired without detriment to the joint-stock is indivisible.—Interpretation of the *Vivåda-ratnákara*.

4*th.* As by no text is a woman authorized to dispose of, by gift or sale, immovable property given to her by her husband; in like manner she has no authority to dispose of, by gift or sale, her husband's immovable property which she has inherited.—*Vivåda-chintámani*. So also the *Prakásh* and *Ratnákara*.

5*th.* When the husband is deceased, his kin are the guardians of his childless widow. In the disposal of the property, and care of herself, as well as in her maintenance, they have full power. Text of *Náreda* cited in the *Vivåda-ratnákara*, and other authorities.

6*th.* A gift, pledge, or sale of lands, houses, or slaves, by a dependant person, is invalid or inefficient. Text of *Kátyáyana* cited in the *Vyavahára-chintámani*.

7th. Let the childless widow, preserving unsullied the bed of her lord, abiding with her venerable protector, enjoy with moderation the property until her death. After her, let the heirs take it. Macn. H. L. Vol. II, Chap. I, Section ii, Case 14.

The fact of a widow's having recovered her husband's share by litigation, gives her no additional power over it.

Q. There were three brothers who held some landed property in co-parcenary, one of whom died childless, leaving a widow, who succeeded to the share of her husband. Subsequently, the surviving brothers sold their entire estate, including the share to which the deceased was entitled, to a stranger. The widow applied to a court of justice for her husband's portion: a decree was passed in her favour, and she was put in possession of the property claimed. She then, notwithstanding that her husband's two brothers' sons and grandsons in the male line were alive, made a gift of the whole of her husbands' property, which she recovered by litigation, to one of her husband's brothers' grandsons. In this case, has the gift validity or otherwise ?

R. Under the circumstances above stated, the widow was incompetent to give away her husband's whole property to one of his brothers' grandsons while there were his other nephews and their sons existing, and the gift must be considered illegal, as expressly declared by the following sages. *Kátyáyana* : "Let her enjoy with moderation the property until her death. After her, let the heirs take it." "Let the widow, preserving unsullied the bed of her lord, take his share; but she may not seek independency while she lives, to give, pledge, or sell it."

"Even in this case, if a partition should have been made, the widow is not entitled to the immovable property."—Macn. H. L. Vol. II, Chap. viii, Case 46.

A widow having received instructions from her husband to adopt a son, and without doing so, making a gift to a stranger of the property, which had devolved on her at her husband's death such gift is invalid.—Macn. H. L. Vol. II, Chap. viii, Case 40.

The son of a *Súdra* by a concubine or female slave, is entitled to inherit property, but his widow is incompetent to aliene to the prejudice of other heirs.—Macn. H. L. Vol. II, Chap. viii, Case 49.

A widow cannot alienate, by gift or will, property devolved on her from her husband, nor her own acquisitions made by means of such property.—Macn. H. L. Vol. II, Chap. viii, Case 49.

Sale by a widow, without the consent of the next heirs, of any part of the property devolved on her from her husband is invalid, except under special circumstances.—Macn. H. L, Vol. II, Chap. xi, Case 9.

A widow may, for the spiritual benefit of her deceased husband, make a gift of a small portion of his estate, to her own relation. Macn. H. L. Vol. II, Chap. viii, Case 32.

A gift of personal property inherited by a widow to her daughter's husband, is good, though the daughter be living.—Macn. H. L. Vol. II, Chap. viii, Case 9.

A widow may alienate a portion of her late husband's property for his spiritual welfare, or for her own subsistence.

But not for her own subsistence, if the next heir agree to support her.—Macn. H. L. Vol. II, Chap. viii, Case 4.

Sale by a widow of landed property is good, if necessary for the support of the family.—Macn. H. L. Vol. II, Chap. xi, Case 2.

The sale by a widow of her husband's landed property is valid, if necessary for her maintenance.

Q. There were three uterine brothers, who held their patrimonial lands in joint tenancy. Two of the brothers died, each leaving a widow, and the other brother still survives. The estate is jointly possessed by these individuals. The widows, being much distressed for the means of maintenance, sold a part of their husbands' shares of the joint landed estate, without the consent of their husbands' brother, and appropriated the purchase-money to their own use. In this case, is the sale good and valid?

R. The text of *Vrihaspati* cited in the *Dáya-bhága*:—"Let the wife of a deceased man, who left no male issue, take his share, notwithstanding kinsmen, a father, a mother, or uterine brethren be present."

"Therefore the widow of a person dying without male issue takes his entire heritage, even though his father and brother be living, because she confers benefit on her deceased husband by preserving her life with the enjoyment of his wealth, and by offering oblations to his manes: and if she, having become indigent, defile her chastity, then hell becomes her husband's portion. Under these circumstances, the preservation of her chastity and life is absolutely necessary. If, with the produce of their husbands' estate, their maintenance cannot be supplied, they (the widows) for the purpose of acquiring the means of subsistence, may mortgage or sell a portion of their husbands' landed estate, and the sale in such case is legal and valid."

Dowlut Singh, versus *Bukhtawur Singh.*

Macn. H. L. Vol. II, Chap. xi, Case 12.

Sale by a wife of her insane husband's estate, when valid.

Q. A woman, during the lifetime of her insane husband, sells a portion of his landed property for the purpose of performing the funeral obsequies of her mother-in-law. In this case, according to law, is the sale complete and binding?

R. Should a wife sell a portion of her husband's estate, he being childless, and of confirmed insanity, for the purpose above stated, such sale is good in law.

Zillah Sylhet, November 26th, 1817.—*Sib-persaud* v. *Sooberna Dassea.*—Macn. H. L. Vol. II, Chap. xi, Case 21.

Circumstances under which the husband's heirs are liable for a debt contracted by his widow.

Q. A person died, leaving a widow, who succeeded to his estate, subject to the law which allows her only to enjoy the property with moderation until her death, but not to give or sell it, and

having contracted a debt, either to save the property left by her husband or for other purposes, died without liquidating such debt, leaving her husband's brother and brother's son claimants to the property. Her husband's brother took possession of the property, and the other brother's son obtained a decree for a moiety of the same. In this case, will the liquidation of the debt rest with the brother and the brother's son of her husband?

R. Supposing the proprietor's widow, who succeeded him, to have contracted the debt for the payment of rent due to Government, or other necessary disbursements to save the estate, or for the purpose of promoting her husband's spiritual welfare, or for the support of the family, or for the due execution of any conditions made by her husband, and to have died prior to the liquidation of of such debt, the proprietor's heirs, that is, his brother and brother's son, are bound to discharge the debt. And if the amount was borrowed for the purpose of being appropriated to any other purposes than those specified, such debt must be satisfied by him who becomes possessed of her jewels and other movable property. This opinion is conformable to the *Dáya-bhága, Mitákshará, Viváda-chintámani, Dipa-kalica,* and other legal authorities.

Authorities.

The text of *Náreda* cited in the *Dáya-bhága*:—"What remains of the paternal inheritance over and above the father's obligations, and after payment of his debts, may be divided by the brethren, so that their father continue not a debtor."

The necessity of liquidating the debt is recognised by the text of *Goutama* cited in the Mitákshará:—"He who takes the assets of a man leaving no male issue, must pay the sum due *by him*;" and by the text of *Vrihaspati* laid down in the *Viváda-chintamani*:—"A father being dead, his sons, whether after partition or before it, shall discharge his debt, in proportion to their shares; or that son alone, who has taken the burden upon himself.*"

Menu in the *Dipa-kalica*:—"If the debtor be dead, and if the money borrowed was expended for the use of his family, it must be paid by the family, divided or undivided, out of their own

* This is not the text of *Vrihaspati*, but of *Náreda*, in Digest, Vol. I, page 275.

estate." By the term "father," mentioned in all the texts, it must be understood, the father and others.

The debts which are not to be chargeable are noticed in the *Vivâda-chintâmani* :—"A son need not pay in this world money due by his father for spirituous liquors, for lustful pleasures, for losses at play; nor what remains unpaid of a fine or toll; nor any thing idly promised."

Dacca Court of Appeal, May 29th, 1820.—Macn. H. L. Vol. II, Chap. x, Case 7.

Responsa Prudentum.

The widow of a man of the goldsmith caste, having made a Will, by which she disposed of her property to a stranger, to the prejudice of her daughter, who neither subscribed nor consented to it, it is void by the *Dharma Sástra ;* and the person in whose favor it was, having been at the expense of her funeral, the amount should be re-imbursed out of the estate, and the residue made over to the daughter.

By the Pundit.

Remarks.—A woman may dispose of her own peculiar property *(Strí-dhana,)* but what comes to her from her husband, she can only give away with the sanction of his kin; with him whom the control of her conduct rests. Without such sanction, even the consent of the daughter, as next presumptive heir, would hardly suffice.

It is equitable that the funeral expenses should be re-imbursed. For the person who takes the succession is bound to defray the obsequies.—3 Dig. p. 545. C.

Stra. H. L. Vol. II, (2nd Ed.) p. 407.

A. Ramasamy, *versus* Mandavilly Pariah.

A childless widow having succeeded to the separate property of her husband, who has brothers living, to what extent has she power to aliene it, and how? *Answer.—Caret.*

Remarks.

A widow who succeeds to her husband's estate, is restricted from aliening the *immovables* without consent of his heirs, accord-

ing to the *Mádhavya;* but there does not appear to be any restriction on her power, as affecting *movables.* C.

The property of a widow in her husband's estate, is not absolute. *Na strí swáttantryamarhati.* "No woman, under any circumstances, is absolutely independent." A woman has a right to use the property to a certain extent in charity, though, no doubt, the Court would restrain *waste,* even on this account.

E.

Stra. H. L. Vo. II, (2nd Ed.) p. 408.

Answer of Pundit.

I am of opinion that the wife of Pandita Royaloo had sufficient authority to give away the land left by her husband, and that Mallayah, the respondent, has no right to oppose the gift, his father not having objected, when Pandita divided away and distributed, at his pleasure, some parts, reserving to himself the residue of what he had acquired.

(Sd.) V. NARSIMMA, SHASTREE.

Remarks.

It is maintained in the *Mádhavya,* that no widow can give away immovable property, coming to her from her husband, without consent of the next heirs. This seems to be the correct doctrine. Pandita had doubtless power to give away his lands; but what he did not give away, may, and should, pass regularly in succession. C.

The widow had no right to make the gift in question. She had a right to use the property for charitable purposes; but the law limits even these to what may be consistent with her circumstances and condition in life. E.

Stra. H. L. Vol. II, (2nd Ed.) p. 410.

SECTION II.

RELATIVE TO DAUGHTER'S SUCCESSION &c.

Madras H. C.—*The 21st of February*, 1863.

Perammál, Appellant, *versus* Venkatammál, Respondent.

A Hindú widow, whether childless or not, stands next in the order of succession on failure of male issue

Daughters can only succeed on failure of widows.

Where A, had two wives, B, and C, and B, predeceased A, leaving three daughters, and C, survived A, and was childless :—*Held*, that C, succeeded to A's property in preference to the three daughters.

Strange, J:—The plaintiff has brought this suit on behalf of three minor daughters of one Venkata-svámi Náyak. She is their grandmother and guardian, and she seeks to recover for them their father's estate.

The acting Subordinate Judge has decreed in the plaintiff's favour and the Civil Judge has affirmed his decision.

The fact that the minors' mother died *before* her husband Venkata-svámi Náyak shows that the estate never vested in her, and consequently could not be transmitted through her. The minors have thus no rights derivable from their mother. Whatever rights they may possess must be traceable from their father Venkata-svámi Náyak. Now it is indubitable that a widow, whether childless or not, stands next in the order of succession on failure of male issue, and that daughters can only succeed on failure of widows. The law being thus, the minor daughters of Venkata-svámi Náyak, can have no right to the estate during the life-time of his widow the first defendant.

We therefore reverse the decrees below and dismiss the suit with costs.—Mad. H. C. Rep. Vol. I, p. 223.

Calcutta, H. C. A.—*The 14th of February* 1865.

Present:

The Hon'ble G. Loch and W. S. Seton Karr, *Judges.*

BENODE COOMAREE DEBEE, (Plaintiff) Appellant,

versus

PURDHAN GOPAL SAHEE, and others (Defendants) Respondents.

Married daughters are not excluded from succession by either the Dáya-bhága or the Mitákshará.

The plaintiff, as the legal heir of the deceased Gobind Singh, sues to recover possession of her father's ancestral property. She alleges that her father, Purdhan Gobind, having inherited the property, died in 29th of September 1831, (14th Assin 1248 B. S.) leaving as heirs his two widows, Sheeb Koomary, mother of the plaintiff, and Soogun Koomary, and his daughter, the plaintiff, and her two sons, Gopal and Dul-gobind; that her mother succeeded to the property under the law of inheritance current in Bengal; but owing to her dislike to her daughter, the plaintiff, and her children, she made over the property to Monee-nath Sahee, a distant relation of the family, from whom she received a payment of *malikanah* and continued in possession till her death on the 31st of May 1852; that under the law of the *Dáya-bhága*, by which succession in the family is governed, the plaintiff is entitled as the nearest legal heir to succeed to the property of her mother; that she is prevented from taking possession by the defendant Purdhan Gopal Sahee, son of Monee-nath Sahee, and she, therefore, brings this action to obtain possession with mean profits.

The case was again heard by the present Deputy Commissioner or Collector on the 17th of September 1863, and he dismissed the suit for the following reasons: that the family is governed by the Mitákshará law; and, under it, a married daughter cannot succeed to her father's property. Further, that the plaintiff, in another suit, brought by the Rajah of Chota Nagpore for the resumption of these lands, waved her right to the property in favor of her son, Gopal Singh, and, therefore, she is stopped from making the present claim.

We do not concur in the reasons assigned by the Judge below for dismissing the suit, though we are satisfied that his order of dismissal is the proper order to be passed, but on other grounds than those given by the Lower Court. Whether succession be gov-

erned by the law of Bengal (the *Dáya-bhága,*) or by that of Benares (the Mitákshará), married daughters are not excluded from succeeding by either of these laws. By the law of Bengal, the unmarried daughter is the first entitled to inherit; if there be no maiden daughter, then the daughter who has, and the daughter who is likely to have, male issue, are together entitled to the succession, daughters who are barren or widows without male issue, or mothers of daughters only, can, under no circumstances, inherit. By the law of Benares, preference is given to the maiden daughter; failing her, the succession devolves on the married daughters who are indigent, to the exclusion of wealthy daughters who succeed in default of indigent daughters. But no preference is given to a daughter who has, or is likely to have, male issue, over a daughter who is barren, or a childless widow. It is evident, therefore, that the Judge was wrong in supposing that a married daughter could not succeed.

The second reason assigned by the Judge is also incorrect, for any thing that plaintiff may have said in a petition filed in another case, to the effect of her being guardian of her son who is entitled to succeed, can be no estoppel to any right that she may have to the property as against a third party holding adverse possession, the more so when such statement has been rendered nugatory by a decision of the Sudder Court, which declared the son incapable of bringing an action during the life-time of his mother and grandmother. The plaintiff seeks to recover possession after the opposite party have been in undisputed possession for more than thirty years.

Now, this statement shews unmistakeably that succession to this property did not follow the Law of Inheritance current in Bengal as laid down in the *Dáya-bhága,* but rather that there was a family custom by which the eldest sons succeeded to the exclusion of the others as averred by the defendant. Then it is alleged by the plaintiff that her mother was in possession of the property; but she has given no proof whatever of such possession,—and even if her mother had, as she declares, taken steps to deprive her of the inheritance, yet the other widow of Gobind Sahee was not likely to give up her rights to the property, and yet we hear nothing of her possession and enjoyment. Again, it is not probable that, if the widow of the deceased Gobind had been entitled to retain possession during her life-time, she would have waived her rights in favor of

a distant relative to the injury of her own children, for the Court can find no proof of the ill-will said to have existed between the mother and daughter; nor do we think it at all likely that, had the plaintiff's mother succeeded to actual possession, she would have been deprived of it by the Governor General's Agent in 1833. On the whole, therefore, we think that plaintiff has entirely failed to make out her case. Her own admissions prove that the course of inheritance is not governed by the law current in Bengal, and in support of her other allegation she has not given a shadow of proof. We dismiss the appeal with all costs and interest thereon from the date of decision to date of realization.—S. W. R. Vol. II, p. 176.

Though married and a widow, the daughter succeeds on the death of her divided father's widow.—*Sooba Moodelly*, v. *Auchalay Ammoy*.—Mad. S. R., for 1854, p. 153. And this, even such widow be not her mother.—R. A. S. 140—59. *Vide* Norton's Leading Cases Part II, p. 512.

Under the Mitákshará law, a daughter can inherit a separated share; where the property is held jointly, the widow or daughter cannot succeed, but are only entitled to maintenance.—*Kooladah Debia*, v. *Rajmotee Debia*.—S. W. R. Vol. XII, p. 453.

Under the Hindú law, the daughter of a deceased member of a family to whom a separate property was awarded for maintenance, is a superior heir to a brother's grandson.—*Chowdhry Hurree-hur Pershad Dass Puhraj*, v. *Gokoolanund Dass Muha-pattur*.—S. W. R. Vol. XVII, c. r. p. 129.

Under the Hindú law, where property is proved to be a separate and divided property, the daughters and daughter's son are the legal heirs entitled to it, and not more remote relations to the deceased.—*Burrigar Singh* and others v. *Mussummat Hunsee* and others.—Agra H. C. Rep. Vol. II, a. c. p. 166.

Held that, between two married daughters, the circumstance of having a son is no qualification on this side of India, giving the married daughter having a son a prior claim to inheritance of her parents' property over the married daughter not having a son; such priority of claim depending on the several daughters being respec-

tively endowed *(sa-dhan)* or unendowed *(nirdhan)*, the unendowed daughter having the preference.

Semble—a daughter who becomes incurably blind in her infancy has no right to inheritance, but only to maintenance.—*Baku-bái* widow of *Ram Dáss Vrij Bullub Dáss* Appellant v. *Muncha-bái* wife of *Moti-lál Ram Dáss* Respondent.—Bom. H. C. Rep. Vol. II, page 5.

On this side of India, having male issue does not determine the right to inherit. Comparative poverty is the only criterion for settling the claims of daughters to their father's estate. A *nirdhan* (unendowed) daughter has preference over a *sa-dhan* (dowered) daughter—*Poli widow* Appellant v. *Nurotum Bápü* and *Lálá Keshav Shet* Respondents.—Bom. H. C. Rep. Vol. VI, p. 183.

See *Nund Koonwur* v. *Tootee Singh* and *Ahlad Singh*.—Sel. S. D. A. Rep. Vol. I, p. 330. *ante* p. 227.

Calcutta, H. C. A.—*The 12th of May* 1874.

Present:

The Hon'ble J. B. Phear and G. G. Morris *Judges.*

Dowlut Kooer, (Plaintiff,) Appellant *versus* Burma Deo Suhoy, and another (two of the Defendants) Respondents.

Under the Mitákshará, as well as under the law of the Bengal School, the unmarried daughter takes the whole of the property in preference to her married sisters; but under the Mitákshará she only takes in priority of them, and not to the ultimate exclusion of their right to inherit from their father. On her death it goes according to the ordinary rules to the next surviving heir of the last full taker of the property.

Phear J.—In this case one Jusoda Kooer, daughter of Brij Beharee Laul, upon the death of her mother took the property which is the subject of suit, and which had belonged to her father, Brij Beharee Laul, deceased, in preference to her sister Dowlut Kooer the reason for her being preferred to her sister in this respect being that she was then unmarried, whereas Dowlut Kooer was married.

Jusoda Kooer, after thus obtaining the property, married, and it is alleged in this suit that she has a son, one Jankee Persad, who is still living, Jusoda Kooer herself has lately died, and Dowlut Kooer, her sister, who survives her, now makes claim to the property in succession to her. And the question is whether Jusoda Kooer took the property on the death of her mother for an absolute estate, or whether she took it only for the estate of the female heir of her father Brij Beharee Laul.

The right of the daughters under Mitákshará Law to inherit the property of their father in default of male heirs and in default of his widow rests on the provisions of Section 2, Chapter II, of the Mitákshará.

There appears in this Section to be no restriction upon the right of inheritance or limitation in the nature of the tenure by which the daughter holds her father's property when she thus succeeds to it; but at the same time neither is there in the Mitákshará any expressed restriction or limitation in this respect as to the right of the widow in the property which she takes upon her husband's decease. In both cases alike the Mitákshará is very concise, and merely says that the widow or daughter, as the case may be, in default of male heirs takes the property. Nevertheless the Courts of this country and the Privy Council have unquestionably decided a limitation of right in the mother's case. In the case which is reported in the VIII Moore's Indian Appeals, p. 551*, the Privy Council makes the restriction of widow's right depend upon general considerations which are just as applicable to the case of the daughter as to the case of the widow; in other words, which are common to the circumstances of all female members of the joint Hindú family. The restriction or limitation upon the widow's right is two-fold, namely, in regard to the power of alienation, and also in regard to the persons who succeed to the property upon her death. And we should be bound upon the authority of the case followed by the Privy Council itself again in the case in 11 Moore's Indian Appeals p. 172,† to hold that notwithstanding the absence of an express enactment upon this point, so to speak in Section 2 of Chapter II, of the Mitákshará, still the same limitation in the

* 2 W. R. P. C. 61. *Ante*, p. 260. † 10 W. R. P. C. 3.

power of alienation, and the same restriction with regard to the persons who succeed, exist in the case of a daughter as in the case of a widow.

But we have further the opinion of Sir William Macnaghten, page 21 of Hindú Law, who says:—"In default of the widow, the daughter inherits, but neither is her interest absolute." In Strange's Hindú Law, p. 138, the same doctrine is laid down. And the late Chief Justice Sir Barnes Peacock, in the case which is reported in IX Weekly Reporter, p. 509, expressly stated that the same restrictions and peculiarities which attach to the widow's rights in her husband's property, also attach to the rights of the daughter and other female heirs. It is true that under Para 3, Section 2, Chapter II of the Mitákshará, the unmarried takes solely when there is a competition between an unmarried daughter and married daughter. And in the doctrine of the Bengal School, which has been evolved from Chapter XI, Section 2, para 30 of the *Dáya-bhága*, the right of the unmarried daughter, who thus takes in preference to her married sisters, is held to resemble an absolute right in this respect, namely, that if she dies leaving a son and sisters, the property goes to her son and not to her sisters.* But the reason for this special course of descent in that case is to be found in special words in the paragraph 30, Section 2 of Chapter II of the *Dáya-bhága* itself—words which are introduced by the Commentator, and which are not to be found in the Mitákshará, nor any words equivalent to them. These words are simply parenthetical; and however good a foundation they may afford for the doctrine of the Bengal School, they do not give any reasons for modifying or affecting the provisions of the Mitákshará in those districts where the Dáya-bhága is not the governing text book. And Macnaghten, after the passage which has just been referred to, goes on to say:—"According to the doctrine of the Bengal School, the unmarried daughter is first entitled to the succession." (And that is so also under the Mitákshará;)—"If there be no maiden daughter, then the daughter who has, and the daughter who is likely to have, male issue, are together entitled to the succession," and so on.

* This is not according to the *Dáya-bhága*, but according to Srikrishna and Macnaghten.—*Vide Vyavasthá Darpana* (2nd Ed.), pp. 1062, 1063.

And in page 24, he says:—"If one of several daughters who had, as maidens, succeeded to their father's property, die leaving sons, and sisters, or sisters' sons, then according to the law of Bengal, the sons alone take the share to which their mother was entitled, to the exclusion of the sisters and sisters' sons." Afterwards he adds:—"This distinction does not seem to prevail any where but in Bengal.*

A decision of the Bombay High Court,† was relied upon by the lower Appellate Court, but it has already been held by this Court that *that* decision does not correctly express the law in regard to the daughter's succession to their father's property as it obtains in this country.—See 20. W. R. p. 102.

On the whole we have no doubt that although under the Mitákshará law, as well as under the law of the Bengal School, the unmarried daughter takes the whole of the property in preference to her married sisters, if there be any, still, under the Mitákshará, she only takes in priority of them and not to the ultimate exclusion of their right to inherit from their father. Upon her death, we think, that the property, must go according to the ordinary rule which governs the descent of property on the decease of the female heir; that is, it goes to the next surviving heir of the last full taker of the property. In the present case it must go to the nearest heir of Jusoda Kooer's father, that is her sister Dowlut Kooer.

In this view we are of opinion that the decision of the Lower Appellate Court is wrong in law and that the plaintiff is entitled to a decree, and, therefore, the decree of the Lower Appellate Court must be reversed, and the decree of the first Court affirmed with costs in this Court and in the Court below.—S. W. R. Vol. XXII, p. 54.

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* Not also in Bengal. *Vide Vyavasthá Darpana*, pages. 1062, 1063.

† 1 Bombay H. C. o. c. j. 130, post p. 420.

BOMBAY, SUPREME COURT.—*The 8th of November*, 1859.

PRAN-JIVAN DASS TULSI DASS and JOG-MOHUN DASS JAMNA DASS, Plaintiffs,

versus

DEVKUVAR BAI widow of RAM DASS HERA CHAND, deceased, BHAGVAN DASS PURSHOTAM DASS, GOKAL NATH SAVAK NATH, and NANA BAI, PARBHU DASS, (executors of the last will and testament of PURSHOTAM DASS HIRA CHAND, deceased), and ARTHUR JAMES LEWIS, Advocate general of Bombay, Defendants.

A Hindú, an inhabitant of Bombay, entitled to separate movable and immovable property, dies without male issue, leaving a widow, four daughters, a brother, and the male issue of other deceased brothers. The widow is entitled to the movable property *absolutely*, and to the immovable property for life. Subject to the widow's interest, the immovable property descends to the daughters *absolutely* in preference to the brother, and the issue of the deceased brothers.

One Hira Chand Lakshmi Chand died in the Christian year 1819, leaving four sons, Ram Dass, Purshotam Dass, Tulsi Dass and Jumna Dass. Tulsi Dass died intestate, in 1830, leaving one son, the plaintiff Pran-jivan Dass Tulsi Dass, Jumna Dass died intestate in 1832, leaving one son the plaintiff Jog-mohun Dass, Jumna Dass. Ram Dass died in 1846, leaving a widow the defendant Devkuvar Bai, and four daughters who were all married, but no male issue. In his life-time Ram Dass had executed a Guzrati Will, which contained the following residuary gifts :—"And whatever surplus of my funds there may remain, the same is to be expended for charitable purposes in my name, with the consent or advice of my wife, and my brother Purshotam Dass."

The plaintiffs filed their bill against the defendants, and amongst other things prayed that the residuary bequest in the Will of Ram Dass might be declared void and inoperative, as being so vaguely expressed as to be incapable of being carried into effect, and that it might be declared that plaintiffs, as co-heirs with Purshotam Dass, of Hira Chand and also of Ram Dass, and as members of a joint undivided family became entitled upon the decease of Ram Dass, to one-third part each of his residuary estate.

The evidence taken at the hearing was considered by the Court to show that Ram Dass had separate property, movable and immov-

able, in respect to which his Will, and the residuary bequest therein contained could operate; and two questions arose with regard to residuary bequest. I.—Was the same a valid bequest to charity, having regard to the vagueness and generality of Guzrati word for charity, *viz.* "*Dharm*," used in the Will? and II.—If the bequest was void to whom did the residuary property of Ram Dass, the subject of such bequest, descend? The decision of the Court with respect to the first point was that the bequest was void, and that the residue was undisposed of. The judgment of the Court on the second point was delivered on the above day by Sausse C. J., and was in substance as follows:—

The testator left a widow and daughters, and we must consider first what estate the widow took, the husband dying leaving separate property. I have felt considerable difficulty in coming to any decision, the schools being so conflicting, and it is difficult to follow the reports of the *Adálut.* The books of chief authority in this part of India are three: *Manu,* the *Mitákshará,* and the *Vyavahára Mayúkha.* Mr. Colebrooke in a letter, set out in the Appendix to Strange's Hindú law,* speaks of the *Mayúkha* as being in the west of India, and particularly among the Mahrattas, the greatest authority after the Mitáksharâ. Mr. Borradaile, in his reports also, speaks of these as being the three books generally referred to in this part of the country. I had enquiries made of the *shástrís* here and at Poona, and was informed that these three books have been established by usage as authorities in this part of India, and for the last eighty years have been referred to as such upon the law of inheritance in this presidency.

On this side of India, a different rule is considered to prevail, and it is based on the authority of the three books I have mentioned. In Strange† it is stated that the restrictions there mentioned on the disposing power of a widow over property inherited from her husband, seem to concern land only, whereas with regard to movables she has a greater latitude. He cites Bengal Reports of the year 1812, and two Borradaile's Bombay Reports p. 428. I have referred to the latter, but it does not appear to support the statement. In Steel's "Summary of Law and Customs of Hindú Castes in Dakhan," published by authority of the Bombay Government in 1827, it is laid

* Vol. I, p. 318. † Vol. I, pp. 246, 247.

down that the widow of a separated brother dying without male issue succeeds by inheritance to the whole of his share of the family property and acquisitions, but that she has no right to alienate immovable property without the consent of all the male heirs,* and subsequently, "females, however, possess a life-interest only in immovable inherited property and cannot, therefore, alienate it without the consent of the next male heirs.† He also states that in Khandesh and Satárá the widow is heiress to the husband's personal property, but holds the real property for life, and without power of alienation. In the Mitáksharᇠit is laid down as a settled rule that a wedded wife, being chaste, takes the whole estate of a man who, being separated from his co-heirs, and not re-united with them dies leaving no male issue. In the Mayúkha§ the law is laid down very much the same way. From these authorities it would appear that a widow takes an absolute interest in her husband's estate; but in answer to my question the *Shástris* stated that as to the immovable property she is limited to the use of it for life, but she has power over the whole estate for proper purposes, provided she exhaust the movable before resorting to the immovable property, the latter being an object of care to the Hindú law, with a view to preserve it for the heirs. The schools and the cases are conflicting, but I find that over the movable the widow has, according to some cases, a power of disposal, but that this power is denied in respect to the immovable. In Madras it was said that a widow may give away personal property during her life, but cannot will it.

On the whole, I think the spirit and practice of Hindú law, as recognised in Western India, will be best construed by treating the widow as having uncontroled power over the movable estate, but as having nothing more than a life-use in the immovable estate. The widow has according to the text books a number of duties thrown upon her in respect to the mode of spending money she may have inherited, but these duties are of such a character, that it would be impossible for the Court to enforce the performance of them. I have, therefore, come to the conclusion that in regard to immovable property her estate is in the nature of that of a tenant for life.

* Para. 25, p. 42.

† Para. 72, p. 69.

‡ Chap. II, Sect. 1, para. 39.

§ Chap. IV, Sect. 8, paras. 1 and 2.

The widow, then, not having an absolute estate in the immovable property, it remains to determine who are entitled to the absolute interest subject to the estate taken by her. In this case there are daughters. Now, according to all the authorities, the daughters take next after the widow. What, then, is the nature of the estate they take? Here, again, there are differences of opinion, but dealing with the question according to the three books I have mentioned, it appears to me that the daughters take an absolute estate. We find quoted in the *Mayúkha*,* a passage from *Manu*: "The son of a man is even as himself, and the daughter is equal to the son; how then can any other inherit his property, but a daughter, who is as it were himself.' With reference to this point, also, I consulted the *Shástrís* both here and at Puná, and inquired whether daughters could alienate any, and what, portion of the property inherited from a father who died separate. The answer was that daughters so obtaining property could alienate it at their will and pleasure, and in this the *Shástrís* of both places agreed, both also referring to the above text in the *Mayúkha* as their authority for that position. On reviewing all accessible authorities, I have come to the conclusion that daughters take the immovable property absolutely from their father after their mother's death. I therefore hold that the plaintiffs have no *locus standi* to maintain this suit. The bill must be dismissed with costs as against Dev-kuvar-bái and the Advocate General. As to the other parties, though nominally defendants, they are virtually plaintiffs, and have been acting in concert with them, as to them I think the bill should be dismissed without costs.† Bom. H. C. Rep. Vol. I, p. 130.

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* Chap. IV, Sect. 8, para. 10.

† With respect to the above decision the High Court of Bombay, in the decision of Jamiyat-ram *v.* Bai Jumna (see post) has observed as follows :—"As to the first point, *viz.*, the nature of the estate which the widow of a separated Hindú takes on his death in his immovable property, we have already intimated that it ought, in this Court, to be considered as definitively established. It was in effect settled by an elaborate decision of the present Chief Justice pronounced in the late Supreme Court, after an exhaustive reference to all the accessible printed authorities, and the consultation of many learned *Shastrís*—a decision well known on the other side of the Court as *Devkuvar-bái's* case, and which has since been affirmed in the Privy Council, in a case decided there in the early part of the present year. That decision was that, on this side of India, the widow of a separated Hindú takes only a life state in the separate immovable property of her deceased husband. The notion that according to the Mitákshará such property forms part of the widow's *strí-dhan*, and as such, goes on her death *to her* heirs, not to her *husband's*, was founded on a passage of Sir Thomas *Strange* (Chap. X, on widowhood I. H. L., p. 248) which was itself based on a mistaken reference to the Mitákshará."—*Vide* Norton's Leading Cases, Part II, p. 518.

Partially opposed to the above decision are the following cases:—
CALCUTTA, S. D. A.—*The 3rd of February*, 1829.

MUSSUMMAT GYAN KOONWUR, and JOYA KOONWUR, Appellants,
versus
DOOKHUN SINGH, and DEBEE DUTT, Respondents.

By the Hindú law a daughter has no power to alienate ancestral property to the detriment of the other heirs of her father.

This suit was brought by the respondents, for possession of two-thirds of sixteen mehals in Pergunnah Tilowah, zillah Behar.

Gyan Koonwur had obtained possession of the whole estate of her father, Kehur Singh, under a decree of the Sudder Dewanny, dated the 6th of October 1814.* The plaintiffs asserted, that, on the 6th of November 1816, she executed a deed of partition of the whole estate amongst her three daughters, Nunna Koonwur, Deo Moorut and Oomed Koonwur, or their *then* existing heirs, and under this deed they jointly claimed one share in right of their mother Deo Moorut; and Dookhun Singh a second share, as the adopted son of Nunna Koonwur. Gyan Koonwur, on the other hand, denied that she had ever executed such a deed, but on the contrary pleaded, that she had previously, in October 1815, bestowed the whole estate in gift on Joya Koonwur, the widow of her deceased son. The legality of this deed of gift was denied by the defendants.† The Judge of the Provincial Court, Mr. J. B. Elliot, referred the point of law to the *Pundits* of the Provincial and the City Courts of Patna. They declared that Gyan Koonwur was incompetent to alienate, by gift, the ancestral property she held, whilst there were heirs and claimants to the estate living. On this opinion Mr. Elliot passed a decree setting aside the gift of Gyan Koonwur to Joya Koonwur; but as he gave no credit to the deed of partition, on which the plaintiffs' claim was founded, he also dismissed their suit, leaving the estate in Gyan Koonwur's possession.

From this decision Gyan Koonwur and Joya Koonwur preferred an appeal to the Sudder Dewanny Adawlut. They pleaded as the grounds of their appeal, that it had been ruled in the very decree by which Gyan Koonwur gained possession of the state, that the daughter's son had no right of inheritance, during the life of the

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* See *ante*, p. 227.

† Sic. in orig.

daughter; that, therefore, Oomed Koonwur was her legal heir; and that, as her only heir made no objection to the gift, it was unjust to set aside that gift on the showing of the respondents, who were not heirs.

On the 19th of April 1828, the case came before the Third Judge (G. T. Sealy). He referred the proceedings to the Hindú law officers of the Court and called on them to declare, according to the *Maithila* and Western Schools of law, whether Gyan Koonwur was competent to bestow the estate in gift on Jaya Koonwur; and if not, who was entitled to the estate on her decease. Their reply was to the following effect:—"When a person dies, leaving no male issue, the widow who succeeds to his estate has no right to alienate any part of it, except for religious purposes; and, therefore, the daughter, whose right of inheritance is weaker, that is, who only succeeds on failure of the widow, *a fortiori* can have no such right. Now, it appears from the decree of the Sudder Dewanny Adawlut, dated the 6th of October 1814, that the property in question is ancestral, and not Gyan Koonwur's peculiar property (*Stri-dhun*), and also it seems from the deed of gift that such gift was not made for religious purposes. According, therefore, to the law, as current in the *Maithila* and the West, the deed is invalid. Such being the case, the property will go, after her death, to the nearest heir of her father, Kehur Singh, then living. For, as in the case of the widow, the property goes, on her decease, not to her heir, but to the nearest heir of the husband, who may be then living; so the same rule is to be observed *a fortiori* as regards the daughter. Now, according to the *Maithila* School, there is no descendant of Kehur Singh, who can inherit from him, and, therefore, on Gyan Koonwur's death, the estate will go to the descendant of his father, or grandfather, or other ancestor, who may be his nearest *sapinda*. According, however, to the Western School, Tootee Singh, the son of Kehur Singh's (another) daughter, will succeed to the whole estate on the death of Gyan Koonwur, should he survive her. This difference arises from the Western School considering the daughter's son to be an heir, who is not acknowledged as such in *Mithila*.* This *Vyavasthá* is agreeable to the *Viváda-chintámani*, *Viváda-*

* See, however, the succession of the daughter's son in the Main book.

ratnákara, and *Viváda-chandra*, and other authorities recognized in *Maithila*, and to the *Mitákshará*, *Virmitrodoya*, *Vyavahára-mádhava*, *Vyavahára Mayúkha*, and other authorities recognized in the West."

Mahábhárata.—" For women, the heritage of their husband is pronounced applicable to use. Let not women on any account make *waste* of their husband's wealth."

The *Viváda-chintámani* explains "waste" to mean gift or sale &c., at pleasure.

Vír-mitrodoya:—" The power of a daughter over ancestral property is not such as that she should alienate it at pleasure."

The text of *Kátyáyana* quoted in the *Ratnákara*, *Vír-mitrodoya*, and other treatises:—" Let the childless widow preserving unsullied the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property until her death. After her, let the heirs take it."

Viváda-chintámani:—" First his own son, then his son's son, then his son's grandson, then his chaste wife, daughter, mother, father, brother, brother's son, and the nearest *sapinda*, each claims the inheritance on failure of the preceding."

Mitákshará:—" On failure of the daughter, her son claims a share."

Vír-mitrodoya:—" On failure of the daughter, her son (inherits.)

It thus appearing that the gift by Gyan Koonwur was invalid, Mr. Sealy, on the 5th of May 1828, affirmed the decree of the Lower Court, as far as regarded the litigated property; but as he made their own costs, in both Courts, payable by each party, the opinion of another Judge on this point was necessary, and the case was accordingly brought before the fifth Judge (R. H. Rattray). In the mean time, Gyan Koonwur died; and on the 22nd of May, proclamation being made for her heirs, only her daughter Oomed Koonwur, appeared to claim the property. On the 3rd of February 1829, the case came on finally before Mr. Rattray. He coincided in opinion with Mr. Sealy, and, accordingly, made their own costs, in both Courts, payable by the parties respectively, Oomed Koonwur to discharge the costs due by Gyan Koonwur. Possession of the estate was not awarded to any one by the Court; but any person who considered he had a

title to it, was left at liberty to prefer his claim in the Civil Court, according to the Regulations.—Sel. S. D. A. Rep. Vol. IV, p. 330 (New Ed. p. 420).

CALCUTTA, H. C. A.—*The* 28*th of May* 1873.

Present:

The Hon'ble J. B. Phear, and W. Ainslie, *Judges.*

DEO PERSAD (Plaintiff,) Appellant, *versus* LUJOO ROY (one of the Defendants,) Respondent.

Where the daughter takes her father's property on the death of the widow in default of a son, she takes the inheritance with a qualified power as regards alienation, in respect of which she is in no better situation than the widow. On the death of such daughter, the heir of the *father* succeeds as *his* heir, and not as *her* heir.

Phear J.—It appears to us that there is no doubt *now* on this side of India that, in such a case as this, where the daughter takes her father's property upon the death of the widow in default of a son, she takes the inheritance with a qualified power as regards alienation. She is in respect of alienation in no better situation than the widow, and any alienation which may be made by her is liable to be called in question by the heir of her father, who will take the inheritance at her death in default of a valid alienation. Whatever may be the state of the authorities in the Bombay Presidency (as for instance a case cited on the part of the respondent), here, we think, there is no doubt that on the death of the daughter who has taken the property, it is the heir of her father (the ancestor) who succeeds, and who takes it as the heir of the ancestor, and not as *her* heir. It is not necessary to enquire whether the plaintiff was in existence or not at the time when the alienation was effected, because we think that at no time during the daughter's life, had she an absolute unqualified power of alienating the property. With these views we think the decision of the Lower Appellate Court must be reversed, and the case sent back to that Court for retrial on the merits.—S. W. R. Vol. XX, p. 102.

BOMBAY, H. C.—*The 13th of June*, 1865.

NAVAL-RAM ATMA-RAM, Appellant,
versus
NUND-KISHOR, SHIV-NARAYAN, Respondent.

According to the Hindú law of inheritance as received in the Bombay Presidency, immovable property inherited by a married woman from her father, whether or not it be strictly entitled to the name of *stri-dhun*, descends on her death to her own heirs, and not to her father's ascendants.

An inheritance descending on a married woman from her father classes as *stri-dhun*, and descends accordingly.

The appeal was heard by Arnould Acting C. J. Forbes, and Warden, JJ. The facts of the case are sufficiently disclosed in the following judgment of the Court, delivered by Forbes, J :—

Oomed-ram, a person of the Surati Shrimati Brahman caste, died, leaving a widow, a son named Naro-shunkar, and a daughter named Lalita. Naro-shunkar died in his mother's life-time, but Lalita survived both her mother and his brother. Lalita married Nund-kishor, and had by him two daughters, one of whom named Ruksh-mani, survived her. Naval-ram, the plaintiff in this action, is the judgment-creditor of Huri-shunkar, the husband of Ruksh-mani; and Nurotam, the defendant, is the brother of Lalita's husband, Nund-kishor. Naval-ram sues to obtain a declaration of Huri-shunkar's title to a house in the city of Broach, and some Wazifah land in the neighbourhood, together with the rents thereof, now in the possession of the defendant Nurotam.

The important text of *Manu* on the subject of a woman's *stri-dhun* or peculiar property is the *9th shloka* of the ninth Chapter :—

"What was given before the nuptial fire, what was given on the bridal procession, what was given in token of love, and what was received from a brother, a mother, or a father, are considered as the six-fold *separate* property of *a married woman.*"

The doctrines of *Manu* are not too much to be relied upon at the present time as establishing points of law, it being universally admitted by learned Hindús as well-known that many of them have no force in the "Kali age." It becomes necessary, therefore, to inquire what the commentators have held in interpreting the text above quoted. The authors of the *Mitákshará* and the *Vyava-*

hára Mayúkha are those whose authority commands the greatest respect on this side of India.

The comment of the Mitákshará is as follows:—"That which was given by the father, by the mother, by the husband, or by a brother; and that which was presented (to the bride) by the maternal uncles, and the rest (as paternal uncles, maternal aunts &c.,) at the time of the wedding, before the nuptial fire, and gift on a second marriage, or gratuity on account of supersession, as will be subsequently explained, and also property which she may have acquired by *inheritance*, purchase, partition, seizure, or finding, are denominated by *Manu* and the rest, woman's property."

Further on, the Commentator explains that the enumeration of six sorts of woman's property by *Manu* in the text quoted, is intended not as a restriction of a greater number, but of a denial of a less.

The author of the Mitákshará would appear, therefore, to hold that property received (or inherited) by a woman from her father after her marriage is woman's property.

The opinion of *Nila-kantha*, the author of the *Mayúkha*, appears to be the same. His remark on the text of *Manu* is this:—"Six-fold is here used in order to prevent (its reduction to) a smaller number."

After describing what he considers to be "woman's property," the author of the Mitákshará goes on to explain how it descends.* The appropriate text to our present purpose is the following:—

Para. 12.—"In all forms of marriage, if the woman leave progeny; that is, if she have issue, her property devolves on her daughters."

Jagan-nátha seems to hold that property which a woman *inherits* from her father is not *stri-dhun*, in the strictest sense of that term, but that it is subject to the contract of her husband so long as he lives.

Sir Thomas Strange himself enumerates twelve descriptions of "*stri-dhun*," of which the eleventh is—"property which a woman may have acquired by *inheritance*, purchase or finding, what has been inherited by her being so classed by *Vijnáneshwara* whose

* See however the widow's succession in the Main Book; and the order of succession to the ordinary property in the Mitákshará commencing from that of the widow.

authority prevails in the peninsula; while it is otherwise considered by the writers of the Eastern School."* And as to the descent of woman's property the same author says: "According to the Mitákshará and its followers, the property which the widow may have acquired by inheritance is transmissible to her own heirs, classing with this school as part of her *stri-dhun*,"† the general rule as to *stri-dhun* being that if it belong "to a married woman, whether she die, leaving her husband, or a widow, the immediate heirs to it, including personalty inherited from her husband, with land also according to the Mitákshará, are her lineal descendants in the female line.‡

Mr. Justice Strange, in his Manual, remarks that "*Stri-dhun* embraces property of every description obtained by the female, by *inheritance*, seizure (taking that which belongs to no one,) or discovery,§ and again: "property vesting in a female descends first to her daughters, the unmarried having preference over the married, and the unendowed over the endowed; then to her daughter's daughters, daughters' sons, sons, and son's sons.‖

Sir William Macnaghten remarks that—"in the Mitákshará, whatever a woman may have acquired, whether by *inheritance*, purchase, partition, seizure or finding, is denominated woman's property, but it does not constitute her *peculium*."¶

It must be observed, however, that the author of the Mitákshará expressly guards the supposition that he employs "woman's property" as a technical expression. He says: "The term 'woman's property conforms in its import with its etymology, and is not technical, for if the literal sense be admissible a technical acceptation is improper.—*Ibid.*

According to all the authorities that have been examined above, with the exception of the Eastern School, represented by Jagan-nath, the author of the Digest and which is of little authority on this side of India, it would appear that property inherited by a married woman from her father, whether or not it be strictly entitled to the

* Stra. H. L. Vol. I, p. 31. † Stra. H. L. Vol. I, p. 245.

‡ Stra. H. L. Vol. I. p. 249.

§ Strange's Manual of Hindú Law, Chap. V. Sec. 145.

‖ *Ibid.* Chap. XI, Sec. 354.

¶ Macnaghten's Principles and precedents of Hindú Law, Chap. III, page 35 (Ed. of 1829.)

name of *stri-dhun* or *peculium* (which Sir William Macnaghten does not admit), descends on her death to her own, and not to her father's, heirs; or, to apply the law to the circumstances of this particular case, that Ruksh-mani, the only surviving child of Lalita, was the lawful heir to the property which descended from Oomed-ram to Lalita.

The usage of the country in which the suit arose takes precedence of the law of the defendant in our Courts; indeed, if such an exceptional local usage as that contended for could be shown, it would no doubt be binding upon us. But Bhal Chunder Shástri's opinion could hardly be accepted as a proof of the local usage, nor, if it were, would it be in this instance conclusive, because, all that the Shástri says is that inherited property is not *Stri-dhun*. Mr. Borradaile's work,* on the country, is a body of preconstituted evidence. The following is one of the answers which were given to Mr. Borradaile by the caste of Surati Shrimati Brahmans:—

"If a woman inherits movable or immovable property from her father and dies childless, that property reverts to the father's family, but if she leaves a daughter, the latter is the heir."

Therefore according to the usage of the caste to which she belongs, which usage is in accordance with the Hindú law, as interpreted by the authorities which are of most weight in the Bombay Presidency, Ruks-mani, the only daughter of Lalita, is the heir to the immovable property which Lalita inherited from her father, Oomed-ram.

The work of Sir W. Macnaghten is of more authority in the Bengal Presidency than it is on this side of India. We have already considered the remarks of Sir Thomas Strange, and have come to the conclusion that the interpretation adopted by the Southern authorities alluded to by him is the interpretation which is applicable between the parties in the present suit, and that an inheritance descending on a daughter classes as *Stri-dhun* and descends accordingly.—Bom. H. C. Rep. Vol. I, p. 209.

By Hindú Law, on the death of one of two sisters on whom the hereditary office of dancing girls attached to a Pagoda had passed

* Mr. Borradaile, the translator of the *Vyavahára Mayúkha*, was employed in A. D. 1827, in collecting information regarding the customs of the Hindú castes in Súrat, by putting questions to the accredated heads of the castes and recording their answers. This work has always been considered to be peculiarly valuable.

on the death of their mother, the share of the deceased sister in the office devolves on her daughter, and not on the surviving sister by survivorship.—*Kamakshi* v. *Nagorathuam.*—Mad. H. C. Rep. Vol. V, page 161.

A Hindú died possessed of self-acquired property in land, leaving no sons, or sons' sons, but one widow, a daughter by the widow, and another daughter by an elder wife deceased. The last died in the widow's life-time, leaving two sons :—

Held that the daughters as co-heiresses took an estate in remainder, vested in interest on their father's death, and that such vested right, on the death of one of them during the widow's life-time, passed by inheritance to her sons, who upon the widow's death became entitled to enter into possession of their mother's half as her representatives.

The widow in Western India has only a particular estate for life in the immovable separate property of her deceased husband.—*Jamiyat-ram* and *Uttam-ram* v. *Bai Jamna.**—Bom. H. C. Rep. Vol. III, p. 11.

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* The inaccuracy of the above decision is well shown by Sir John Norton, who, after citing the case of *Joy-gobind Suhae* v. *Mahtab Koonwur* (7 S. W. R. p. 1) and that of *Rai Sham Bullubh* v. *Pran-kissen Ghose* (5, Beng. S. R. p. 21; 3, *Wyman*, p. 118,) has made very good remarks, some of which are as follows :—

"Opposed to this is the case of *Jamiyat Ram* v. *Bai Jumna* (2, Bom.—H. C. R. p. 10), where one Kashi-ram died leaving a widow Ram-bai and her daughter Jumna. He also left a daughter Sooruj by a predeceased wife. Sooruj had two sons. The widow Ram-bai succeeded on her husband's death. Sooruj predeceased Ram-bai, and the Court held that the daughters Sooruj and Jumna took an estate in remainder vesting at their father's death : that the *jus representationis* exists among daughter's sons, just as among son's sons ; and that on the death of Kashi-ram's widow Ram-bai, the sons of Sooruj were entitled to enter into possession of the moiety which their mother would have inherited, if she had survived Ram-bai."

"It is conceived that this decision cannot be supported on more grounds than one. In the first place, it entirely upsets the *ordo successionis*, according to which, no daughter's son can be an heir so long as a daughter survives. (See I, W. and Buhl, page 185. The *ordo successionis* is *one*, by which the more remote only succeeds *in default* of there existing no one nearer living. It was indeed conceded by the Court that the question was to be determined by a consideration of the estate of the family at the death of the widow Ram-bai."

"If this position had been acted on, there being a daughter living at the widow's death, she ought to have been declared the next in succession, the other daughter's sons being postponed as long as she lived. Thus the *ordo successionis* would not have been violated."

"Here it is to be observed that the passage quoted (in the decision) from Sir T. Strange is not correctly applied. This passage from Strange is no authority for the position that an estate vested in *Sooruj eo instanti* of her father's death. The correct position would be that as before the widow's death she had died, the other daughter, *Jumna*, was entitled to succeed as daughter, the next in succession according to the *ordo successionis*; and that on her death, her sister *Sooruj's* sons would succeed, not as representing their mother, but as daughter's sons, and as such the next in the *ordo successionis*."

Opposed to the above three decisions are the following cases which appear to be in strict accordance with Hindú law.

According to Hindú law, a deceased daughter's son has no right of inheritance to the estate of his maternal grandfather during the life of any of his mother's sisters.—*Mussummat Ramdan* v. *Behary Lall.*—N. W. Pro. Rep. Vol. I, Part VII, p. 114.

CALCUTTA, H. C. A.—*The 3rd of January,* 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt. Chief Justice,* and Hon'ble L. S. Jackson, *Judges.*

JOY-GOBIND SOHAI, (Defendant) Appellant,

versus

MAHTAB KOONWUR, (Plaintiff) Respondent.

The survivor of several Hindú sisters is not bound by decrees obtained against her sisters during their lives whose interest was only a life-interest in their father's property which, on their death, passed to the survivor as heir to her father.

Peacock, C. J.—The plaintiff in this case claims as heir to her father. She does not claim as heir to her sisters; and although she and her sisters took the estate as heirs of the father, still her sisters had merely the right which a female takes by inheritance, namely, the right which continues only during her life. The sisters could not transmit the estate to their heirs, but the estate upon their death passed to the plaintiff as the heir of her father. Therefore the plaintiff is not bound by the decrees which were obtained against the sisters during their lives.

The decree of the Lower Appellate Court is affirmed, but without costs, no one appearing for the respondents.—S. W. R. Vol. VII, page 1.

"The *jus representationis* exists among sons because they are all members of the co-parcenary; but daughters are not members of the co-parcenary. They have no right to inherit, if there be male members of an undivided family, they are only entitled to maintenance, which is not the inheritance, but a charge upon it. It is conceived, therefore, that this case cannot be supported. Entirely opposed to this ruling is the passage in I, W. and Buhl., p. 183, and *Mt. Ramdan* v. *Behary Lall,* I, N. W. Pr. R. (Allahabad) p. 114, where it was held that a deceased daughter's son has no right to inherit his maternal grandfather's estate, during the life of any one of his mother's sisters. 2, Macn. p. 44."—Norton's Leading Cases, Part II, pp. 517—521.

A daughter excludes nephews, but if she die without issue (male), the inheritance will go *not* to her husband, but to her father's nephew.—*Ram-joy Seal* v. *Tara-chand.*—East's Notes of Cases, Case No. 53. *Vide* Morl. Dig. Vol. II, p. 79.

The Privy Council affirmed the principle of a decision of a Full Bench of the High Court (9 Weekly Reporter, p. 505), which held that, in the case of succession by a reversionary heir after the death of a widow, who takes inheritance from her husband, and is dispossessed, the period of limitation as against the reversionary heir, in the absence of fraud, is not to be reckoned from the time when he succeeds to the estate, but from the time at which it would have been reckoned against the widow if she had lived and brought the suit.

According to Hindú law the right once vested in a daughter by inheritance does not cease until her death, notwithstanding she become barren, or a widow who has not borne a son. Circumstances of that nature do not destroy a heritable right which has once vested. If* two sisters upon the death of their father, together constitute their father's heir, then upon the death of one of them the property which descended to both jointly, survives to the other whose

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* The conditional conjunction "If" used in the beginning of this sentence is not in the body of the decision from which the above abstract is drawn. That part of the decision of which the above is the marginal note runs thus:—"In the case of *Voidya Nath Sett* v. *Doorga Churn Bosack*, the High Court of Bengal, original jurisdiction, decided on the 28th of February 1865, it was held by Mr. Justice Morgan after consulting Mr. Justice Shumbhoo Nauth Pundit, a learned Hindú Lawyer, that in a case where two Hindú daughters succeeded, by inheritance, to their father's estate, and one of them died leaving her sister who had *then* become a childless widow, the property survived to her sister, because, like widows, the two daughters collectively were, in a legal sense, one heir to their father.—*Vyavasthá Dárpana*, by Shama Churn Sircar (Octavo Ed., page 170). Their Lordships are of opinion that the last-mentioned decision was correct, and that upon principle, as well as upon authority, the estates, upon the death of Saroda Moyee, survived to (her sister) Nittokally, though she would, at that time, have been incompetent to take by inheritance from her father." So the word "if," which alters the sense of the original, must have been inadvertently used in the original.

Some other important parts of the above-mentioned decision are as follows :—

"There is a great analogy between the case of widows and that of daughters taking by inheritance, though the pretention of daughters is inferior to that of widows."

"In the case of widows, it has been held by the Judicial Committee (See *Bhugwan Deen Dobey* v. *Myna Bai*. 11 Moore's Indian Appeals, 487. *ante*, p. 278) that the estate of two widows, who take their husband's property by inheritance, is *one* estate. 'The right of survivorship,' it is there said, is so strong, that the survivor takes the whole property, to the exclusion even of daughters of the deceased widow."

"In the case of *Srimuttu Muttu Vezia Ragunada Rani* v. *Dora Singay Tevan*, 6 Madras High Court Reports, 310 (*vide infra*) it was held, that daughters, to whom as a class paternal property descends, take a joint interest, with rights of survivorship."

"The former case had reference to property in Benares, and the latter to property in Southern India."

"It is clear that an admission, or even confession of judgment, by one of several defendants in a suit, is no evidence against another defendant."

right of survivorship previously acquired by inheritance is not destroyed by her disqualification to inherit at that time by reason of her being a childless widow.*

An admission of a fact on the pleadings by implication is not an admission for any other purpose than that of the particular issue, and is not tantamount to proof of the fact.—*Amrito Lall Bose* and others v. *Rojonee-kant Mitter* and another.—Privy Council. S. W. Rep. Vol. XXIII, p. 214.

CALCUTTA, H. C. A.—*The 1st of September*, 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and
Hon'ble W. Ainslie, *Judge*.

CHOTAY LALL, (one of the Defendants,) Appellant,
versus
CHUNNOO LALL and another, (Plaintiffs,) Respondents.

Property inherited by a Hindú female from her father does not, under the Mitákshará law, descend, on her death, to *her* heirs, but reverts to the nearest heirs of her father.

Couch, C. J.:—The plaintiffs in this suit are the grandsons of Thakoor Dass, who was admitted to be a native of the North-Western Provinces, and had come down to Calcutta and acquired the property which is in dispute. He died in Calcutta in February 1860 intestate, and without having relinquished the law of his birthplace. He left a daughter, Luckhee Bibee, who was five years old at the time of his death, and subsequently intermarried with the defendant Chotay Lall, and died in September 1872 without issue. He also left a brother's son named Inder Chand, who died in May 1871, intestate, leaving the plaintiffs his only sons and heirs. Mr. Justice Pontifex, by whom the case was heard, held that the estate which the daughter Luckhee Bibee took on the death of her father

* There being, in this respect, no difference between the Hindú law as current in Bengal and that current in the other schools, the above decision is equally applicable to such cases of any part of India. Nevertheless as the said decision has been passed in a Bengal case, so its abstract is given here and the main part of it is reserved for the *Vyavasthá Darpana*.

was only a qualified one, and that on her death the plaintiffs, as heirs of her father, became entitled to the property in dispute. And upon the case being sent back by me and Mr. Justice Macpherson, before whom it came in the first instance, to try the issues which had been raised, the first of which was, was Thakoor Dass a Jain? and the second, if so, what is the law of succession applicable to Jains? The learned Judge found that the case should be decided according to the law of the North-Western Provinces. We have, therefore, to determine whether, according to that law, the decision of the learned Judge is right.

The first authority on the subject that I am aware of is in the fourth volume of the Select Reports, p. 330,* in which it was held that by the Hindú law (it being a case from Behar) a daughter had no power to alienate by gift her ancestral property to the detriment of the other heirs of her father. The reply of the Hindú Law Officers of the Court, who were asked to declare, according to the *Mithila* and Western Schools of law, 'whether Gyan Koonwur (the daughter) was competent to bestow the estate in gift on Joya Koonwur; and, if not, who was entitled to the estate on her decease,' (which is the very question in this case) was: "When a person dies, leaving no male issue, the widow who succeeds to his estate has no right to alienate any part of it, except for religious purposes; and, therefore, the daughter, whose right of inheritance is weaker, that is, who only succeeds on the failure of the widow *à fortiori* can have no such right. Now it appears from the decree of the Sudder Dewany Adawlut, dated 6th of October 1814, (this is the part which applies particularly to the present case) 'that the property in question is ancestral, and not Gyan Koonwur's peculiar property (*Stri-dhun,*) and also it seems from the deed of gift that such gift was not made for religious purposes. According, therefore, to the laws as current both in Mithilah and the West, the deed is invalid; such being the case, the property will go, after her death, to the nearest heir of her father, Kehur Singh, then living. For, as in the case of the widow, the property goes, on her decease, not to her heir, but to the nearest heir of her husband who may be then living, so the same rule is to be observed *à fortiori* as regards the daughter.

* See *ante*, p. 424.

The next decision on the subject is in the 6th volume of the Select Reports, p. 301, in a suit relating to the same property. It was held that there being a sister's son's son and a daughter, the former succeeded, and that *per capita* and not *per stirpes*.

The Court in their remark say: "There is no doubt that the sister's son's sons were very distant indeed in the order of succession, and in fact are not included among the heirs by almost the whole of the Hindú legal authorities. As, however, under no circumstances can the (daughter's) daughter succeed to ancestral property inherited by her mother, the Court considered, under the *Vyavasthás* of the *pundits*, that the plaintiff's had the better right to the estate of Kehur Singh the common ancestor of the parties."*

We have next a decision of the Sudder Court, reported in the decisions of 1862, at page 190; where it was held that the estate of a Hindú proprietor having devolved on his three daughters qualified to succeed him, they held the property during life-time only, and not as their *Stri-dhun*; that so long as any one of the daughters survived, no daughter's son could inherit; and that as no son survived when all the three daughters died, the plaintiff, as heir of the deceased proprietor, succeeds to the estate.

The decision in this case appears to have been founded upon a passage in Sir William Macnaghten's work, page 23, where he says: "But though the schools differ on these points, they concur in opinion as to the manner in which such property devolves on the daughter's death, in default of issue male. According to the law as received in Benares and elsewhere, it does not go, as her *Stri-dhun*, to her husband or other heir; and according to the law of Bengal also, it reverts to her father's heirs."

The two decisions in the North-Western Provinces,—reported, one in the 2nd volume of the Agra High Court Reports, page 166, and the other in the 1st volume of the Allahabad Reports, page 114, —do not seem to me to be in point on this question; but in volume 3 of the Weekly Reporter, page 140, we have a decision of this Court in the case of a mother inheriting from her son. The learned Judges held that, on the death of the mother, the property went to

* This finding seems to be incorrect, as under no circumstance can a sister's son's son inherit according to Hindú law.

the heirs of the son, and they said that the rule was the same in the case of a woman inheriting from her father.

More recently there are two decisions in this Court, one of them by Mr. Justice Phear and Mr. Justice Ainslie, and another by Mr. Justice Phear and Mr. Justice Morris,—the first in 20 W. R., 102,* and the second in 22, W. R. 54, in which the same law is laid down.

In the High Court at Madras the same question, as we have before us, rose in a case in 6 Madras High Court Reports, 310.† There the Chief Justice and Mr. Justice Holloway held that the daughters of the first defendant, that is, the person who had inherited from her father, (the suit being brought in her life-time for a declaration of title) were not her rightful successors to the zemindaree, and that the plaintiff, as the eldest grandson of the *istimrar* zemindar, was entitled to be, preferably to the second defendant, declared reversionary heir to the zemindaree on the death of the first defendant. Sir Colley Scotland, the Chief Justice, said,—

"With reference to the second question raised by the appellant's objection to the declaration of the plaintiff's right, whether the zemindary is the *Stri-dhunum* property of the first defendant, I need not add anything, as my conclusion on the first question is obviously decisive of it. But I ought perhaps to say with reference to the arguments (contradictory to those on the first question) advanced on behalf of the appellants, that the authorities do not, I think, present any ground for them. There are some texts and comments recognizing as *Stri-dhunum* paternal property devolving on a daughter, but they appear to me to relate only to an *appointed* daughter, who was declared to become by the appointment the third description of son. . . . The fundamental principle of the law of succession, too, is adverse to the contention of the appellants, for, if paternal property passing to daughter were to become her *Stri-dhunum*, the succession would pass away from those who were the nearest heirs by virtue of their capacity to offer oblations to the last male owner."

Mr. Justice Holloway rested his judgments upon the same ground. Towards the end of it he said : "On the question whether property coming to woman by inheritance is *Stri-dhunum* or not,

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* See *ante*, p. 427.

† The first case in the following section. *q. v.*

I do not consider it of the least consequence for the decision of this case to determine. By calling it *Stri-dhunum*, we should not be in the least assisted to the solution of the order of its transmission, for the various sorts of *Stri-dhunum* are transmitted in very various ways. I will shortly sum up the grounds upon which I come to the conclusion that the decree of the Civil Judge ought to be affirmed." The learned Judge then states the grounds to be:

"1. The principle of the law is to determine the descent by the nearness or remoteness of connection with the offering; there is no taking by or through or by virtue of any individual; the only effect of relationship is to connect with that offering; the very name *Sapinda* is the clearest etymological proof of the predominant notion.

"2 That this principle is the reason for the daughters taking at all.

"3. The principle of the law is the only safe ground for deducing a rule of descent."

As far as the law in that part of India is the same as in the North-Western Provinces, this is an express authority upon the question before us.

On the other hand, there are certain cases in the High Court at Bombay which were relied upon as being opposed to the doctrine which appears to have been consistently held both by this Court and the High Court at Madras. One of them is in 1 Bombay High Court Reports, 130, and is known by the name of Devkuvar-bai's case. It appears to have been there laid down by the Supreme Court at Bombay that a widow is entitled to the movable property absolutely, and to the immovable property for life,—and subject to the widow's interest, the movable* property descends to the daughters absolutely.

It appears from the judgment of the Chief Justice Sir Mathew Sausse and Sir Joseph Arnould, in *Vinayak Anand-rao* v. *Luckshmi-bai* in the same volume, page 117, that this decision was based mainly on the authority of *Mayúkha*—an authority in that part of India. The judgment in the latter case, which seems to have been written by Sir Mathew Sausse to be forwarded to the Privy Council, contains this passage, page 124: "In Devkuvar-bai's case, this Court

* This should be "immovable," see the body of this decision.

in 1859 held that the widow of an intestate, childless, and separated brother takes the movable property absolutely, and the immovable for life only, with remainder to the heirs of the intestate. That decision was very much based upon the principle of allowing the law of usage to control the letter of that portion of the written law which was in favor of the widow. In the Mitakshará on inheritance (Cha. II. Sec. I,) entitled 'Right of the widow to inherit the estate of one who leaves no male issue,' the commentator, after declaring the order of succession (see para. 2,) in words quoted from *Yájnavalkya*, and after discussing various interpretations and opinions, states the conclusion (para. 39) as follows. The learned Chief Justice then quotes the passage. He is speaking of his own judgment in the former case, and says that he based it on the authority of the *Mayúkha*.

The next case at Bombay is *Naval-ram Atma-ram* v. *Nund-kishor Shiv-narayan*, 1, Bombay High Court Reports, 209 (*ante* 428). There three of the learned Judges of that Court held that according to the Hindú law of inheritance as received in the Bombay Presidency, immovable property inherited by a married woman from her father, whether or not it be strictly entitled to the name of *Stri-dhun*, descends on her death to her own heirs, and not to her father's descendants; and that an inheritance descending on a married woman from her father classes as *Stri-dhun* and descends accordingly. It is to be remarked upon this decision that the learned Judges considered the text of *Manu* and the opinions of the commentators and other authorities on Hindú Law, but they do not appear to have been aware of (at least they do not notice) any of the decisions of the Courts on this side of India on the subject, and in considering whether we should treat this case as an authority, this is very material. We may fairly say that a judgment of another High Court in which no notice was taken of the decisions of this Court upon the point ought not to receive the same respect from us as it would receive if the learned Judges had considered the decisions on this side of India.

The next case is in 6 Bombay High Court Reports, o. j., page 1, in which Sir Joseph Arnould, who was one of the Judges in the former case, sat alone.* He held that the property acquired by

* To be found among the cases relative to sister's succession, *q. v.*

a married woman by inheritance, with the exception of property inherited by a widow from her husband, classes as *Stri-dhan*, and descends accordingly. He appears to have held this upon the authority of *Vinayak Anand-rav* v. *Lukhsmi-bai.* He says: "Mr. Marriott's position that, upon the estate vesting in Luckshmi, as sister of Vithal, her son Ramji Krishnaji and his son Mahadeo Ramji thereupon became jointly interested therein as co-partners with Luckshmi, must, in my opinion, be regarded as untenable: it seems opposed to the principles established in Hindú law regarding property coming by inheritance to woman, and inconsistent with the position already adverted to as established by the case of *Vinayak Anand-rav* v. *Luckhsmi-bai* that the sister takes absolutely." But the learned Judge proceeds to notice the decision of the Judicial Committee of the Privy Council and the text of *Cátáyana*, and allows that in the case of inheritance by a widow from a husband, the rule laid down in the Mitákshará does not apply. So far he departs from what had been previously decided, and it will be seen that in this he differs from the judgment, I am about to notice, of Mr. Justice West, who gives as his opinion that the passage in the Mitákshará applies to the case of a widow inheriting from her husband just as much as to that of a daughter inheriting from her father. The case is reported in 8 Bombay High Court Reports, 244, o. c. j., *Vejia Rangam* and another v. *Lakshuman* and another.

Now the decision in that case is founded upon the *Mayúkha.* The Chief Justice says: "The question of Hindú law arising from these facts is a difficult one, but looking (as I think we are in this island bound to do) to the *Mayúkha,* for the law to regulate this case, Thama-bai must be regarded as the legal representative of Yesu-bai in respect of the property in question in this suit, and not the plaintiffs." And Mr. Justice West says: "We must fall back either on the *Mayúkha,* which is equally inconsistent with a current of decisions derived from the analogies of the Bengal Law, or else on the Bengal Law itself." But the learned Judge took the opportunity of this case coming before him to discuss at considerable length and with much ability the meaning of the passage in the Mitákshará, and to comment upon the authorities. He, too, does not appear to have noticed any of the decisions on this side of India. He lays down that the Mitákshará, includes in *stri-dhun*

all property acquired by women by inheritance,—which is contrary, as I have already said, to what had been laid down by Sir Joseph Arnould in the case in 6 Bombay High Court Reports, and contrary also to the decision of the Privy Council in *Bhugwan Deen Doobey* v. *Myna-bai*, 11 Moore's Indian Appeals, p. 487.*

Certainly, when we have the various decisions of the Sudder Court here upon the law which is applicable in this suit and the decision of the High Court at Madras upon a similar law, in which no substantial difference can be pointed out with reference to this question, we ought not to unsettle the law which appears to have been received on this side of India for the last fifty years, on account of the opinion of a Judge of the High Court at Bombay, however learned he may be. The consequences at the present time would be most serious. Courts ought, always, to bear in mind that it is no light matter to reverse a series of decisions which must have been acted upon for many years, and have been regarded as declaring what was the law.

It appears to me that the conclusion which Mr. Justice Pontifex arrived at in this case is the right one, and that his decision ought to be affirmed.—S. W. R. Vol. XXII, pp. 496 and 503—506.

Held that a daughter can claim a declaration of her rights in paternal estates during the life-time of her mother.—*Jeewan Ram* v. *Mussummat Roonta.*—Agra Rep. Vol. I, a. c. page 240.

A daughter without issue is not entitled, during the life-time of the widow, to sue for the recovery of a debt due to the estate of her deceased father, nor is she entitled to a declaratory decree.—*Lukkhee Narain Ghose*, guardian and manager of his minor wife *Koosoom Kaminee Dassy*, pauper, v. *Sree-nath Koondoo* and others. —S. W. Rep. XXIV, p. 226.

Suit by a Hindú daughter, for herself and as guardian of her minor son, to recover possession of her deceased father's separate estate. The legal representatives of the estate were, first, the deceased's widow, and after her the plaintiff and her son. The widow not only failed to occupy and manage the estate, but in collusion with

* 9 W. R., P. C., 23 ;—*ante*, p. 278.

the other defendants claiming under a hostile title, abandoned her rights, alleging that her husband was not separate, but a member of a joint family, and left the hostile holders undisturbed. To preserve the separate estate from becoming extinguished by the operation of the law of limitation it was necessary to remove the adverse occupants and to place the estate in the possession of some person to be appointed to represent it; and as the widow (the legal representative) never was in possession and did not ask for it, but repudiated all claim to it, it was held that no one had a better right to the possession than the plaintiff, and possession was accordingly decreed to her as manager during the widow's life-time.—*Gunnesh Dutt* v. *Mussummat Muttu Kooer.*—S. W. R. Vol. XVII, c. r. p. 11.

PRIVY COUNCIL.—*The 27th, 28th, 29th and 30th of April, 30th of May and 1st of June* 1863.

KATATAMA NACHIER, Appellant,

And

SRIMUT RAJAH MOOTOO VIJOYA RAGU-NADHA BODHA GOOROO SAWMY PARIA ODAYA TAVER.

The zemindary of Shiva-gunga in Madras is in the nature of a principality, impartible, and capable of enjoyment by only one member of the family at a time.

By the law of inheritance prevailing in *Madras*, and throughout the Southern parts of India, separately acquired estate descends to a widow, in default of male issue of the deceased husband.

In a united Hindú family where there is ancestral property, and one of the members of the family acquires separate estate, on the death of that member such separate acquired estate does not fall in to the common stock, but descends to the male issue, if any, of the acquirer, or in default, to his daughters.

Where property belonging in common to a united Hindú family has been divided, the share of a deceased member of the family goes in the general course of descent to separate acquired property; but if there is a co-parcenership between the different members of the united family, survivorship follows.

Upon the principle of survivorship, the right of the co-partners in the undivided estate overrides the widow's succession; but with

respect to self-acquired property of a member of the united family, the other members of the family have neither community of interest nor unity of possession, therefore, the foundation of the right to take by survivorship fails.

A decree in a suit by A, against B, claiming, as widow, to succeed to her husband's estate, in preference to B, his nephew, on the ground of the family being divided, held not to operate as *res judicata*, or capable of being pleaded in bar to a suit by C, a daughter, claiming to succeed to her father's estate, on A's death, on the ground that the property was self-acquired by her father.* Moore's India Appeals, Vol. IX, page 539.

Admitted Legal Opinions.

A daughter cannot claim succession while her mother lives. Unless the mother do some act tending to defeat her right. 2 Mac. 26.

Married daughters succeed to equal portions of an estate which had devolved on their mother at the death of their father by reason of there being no male issue.

R. If a person, being destitute of male issue, and living apart from his brothers, die, leaving two daughters and a widow; in the first instance, the widow succeeds, and on her death the daughters are equally entitled to the inheritance; consequently, while the proprietor's two daughters are living, the widow cannot give her husband's whole immovable property to her second daughter's husband without the sanction of her eldest daughter, but she might have made a donation of the movable property. The gift of the immovable estate made by the widow is illegal. On her death, her two daughters will equally share their paternal landed estate. This opinion is conformable to the *Mitákshará* and *Vyavahára Mayúkha.*

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* The purport of the above decision is thus explained by the Lords of the Privy Council in their judgment passed in the case of Rajah Suraneny Venkata Gopala Nursimha Row Bahadur *versus* Rajah Suraneny Lakshmi Venkama Row. "The Shivagunga case was this—'the family was shown to be undivided, but the impartible zemindary was shown conclusively to have been the separate acquisition of the person whose succession was the subject of dispute. The ruling of this Court was that in that case the zemindary should follow the course of succession as to separate property although the family was undivided; but if that zemindary had been shown to have been an ancestral zemindary as in this case, the judgment of the Board would no doubt have been the other way.'"—Sutherland's Weekly Reporter, Vol. XII. p. c. p. 40. (See the Book on Partition.)

Authorities.

Yájnyawalkya :—"The wife and the daughters,"* &c.

Virhat Vishnu:—"The wealth of him who leaves no male issue, goes to his wife; on failure of her, it devolves on daughters."

Kátyáyana:—"Let the widow succeed to her husband's wealth, provided she be chaste; and, in default of her, the daughter inherits."

Vrihaspati:—"Let the wife of a deceased man, who left no male issue, take his share. The wife is pronounced successor to the wealth of her husband; and in her default, the daughter. As a son, so does a daughter of a man, proceed from his several limbs. How then should any other person take her father's wealth?"

"The daughters share the residue of their mother's property, after payment of her debts."†

"By favor of the father, clothes and ornaments are used, but immovable property may not be consumed, even with the father's indulgence."

"The father is master of the gems, pearls, and corals, and of all (other movable property:) but neither the father nor the grandfather is so of the whole immovable estate."

"Though immovables or bipeds have been acquired by a man himself, a gift or sale of them should not be made without convening all the sons."

"They who are born, and they who are yet unbegotten, and they who are still in the womb, require the means of support: no gift or sale should therefore be made."

Bareilly Court of Appeal, May 18th, 1820.—Macn. H. L. Vol. II, Chap. I, Sec. iii, Case 2.

A maiden excludes all married daughters.

Q. A landed proprietor dies, leaving two married daughters, and one unmarried. Of the two married daughters, one files a plaint in a Court of Justice, claiming a third of the estate left by her father. In this case, who is entitled to the succession? Can a married daughter sue for partition, where there is a maiden daughter living?

* *Dáya-bhága*, page 160;—Mitákshará page 324.

† *Yájnyavalkya.* *See Mit.* p. 266.

R. Of the daughters, the maiden one is, in the first place, heir to the paternal property, by reason of her offering the funeral oblations to the deceased father, to the entire exclusion of all the others.

Authorities.

The text of *Manu*, laid down in the *Suddhi-tattwa* and other law books: "The maiden daughter of a person who dies leaving no male issue, offers the funeral cake to his manes."*

Accordingly, where there are married and unmarried daughters, the maiden exclude the married daughters from the inheritance. To this effect the *Dáya-bhága* cites the text of *Parásara*:—"Let a maiden daughter take the heritage of one who dies leaving no male issue; or, if there be no such daughter, a married one shall inherit." *Manu*:—"His own maiden daughter, born in holy wedlock, shall, like a son, take the inheritance of him who dies without male issue."†

The claim, therefore, of the married daughter is inadmissible.

City of Dacca, 8th January, 1817.—Macn. H. L. Vol. II, Chap. I, Sec. III, Case 1.

There being a son and daughter by different mothers, and the son being insane and dumb, the daughter is alone entitled to the succession.

Q. A person died, leaving a son and a daughter by different wives. The son is insane and dumb, and there is no hope of his recovery. In this case, is the daughter alone entitled to succeed to her father's property, or does it devolve on his maternal grandfather, subject to the condition of his maintaining the son?

R. Under the circumstances stated, in default of his widow, the daughter of the deceased is alone entitled to the succession, to the exclusion of the son. The son's maternal grandfather has no legal claim to any share of the property, subject to the condition stated, but the son must be supplied with the necessaries of life by his half sister.

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* This is not a text of *Manu*, but of *Rhishya-sringa.*

† This is not a text of *Manu* but of *Devala.*

Authorities.

Manu:—"Impotent persons and outcasts, persons born blind and deaf, madmen, idiots, the dumb, and those who have lost a sense or a limb, are excluded from a share of the heritage."

Devala:—"On the death of a father or other owner of property, neither an impotent man, nor a person afflicted with elephantiasis, nor a madman, nor an idiot, nor one born blind, nor one degraded for sin, nor the issue of a degraded man, nor a hypocrite or imposter, shall take any share of his heritage. For such men, except those degraded, let food and clothes be provided."

Zillah Burdwan, July 25th, 1822.—Macn. H. L. Vol. II, Chap. I, Sec. iii, Case 3.

An unchaste daughter is excluded from the inheritance and the property will escheat, if there be no other heir.

Q. 1. Can a daughter who lives in a state of prostitution take her parents' property, by right of inheritance?

R. 1. A daughter who has given herself up to prostitution, or one who is unchaste, is wholly incompetent to inherit the property left by her parents.

Q. 2. Supposing that there be no other legal representative of her parents than the unchaste daughter, in this case, does the law admit her as an heir; if not, on whom will the property devolve?

R. 2. She is not entitled to inherit her parents' property, even though there be no person to claim the inheritance. The person who is next in order of succession, if there be any such, shall inherit from her parents; and in default of such heir, (the parents not being of the Brahminical class,) their property will escheat to the king.*

Zillah 24-Pergunnahs, February 28th 1810.—Macn. H. L. Vol. II, Chap. IV, case 5.

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* It will be seen from the above specimens, that questions connected with loss of caste, and consequent privation of the right of inheritance, are not by any means frequently litigated. I do not recollect having met with any others. Were these disqualifying provisions indeed rigidly enforced, it may be apprehended that but very few individuals would be found competent to inherit property, as there is hardly an offence in jurisprudence, or a disease in nosology, that may not be comprehended in some one or other of the classes.—Note by Sir W. Macnaghten.

SECTION III.

RELATIVE TO THE SUCCESSION OF DAUGHTER'S SON.

MADRAS H. C.—*The 27th of October* 1871.

SRIMUTTU MUTTU VIZIA RAGUNADA RANI KOLUNDAPURI NACHIAR, *alias* KATTAMA NACHIAR, ZAMINDARNI OF SHIVA-GUNGA and four others, appellants,

versus

DARA-SINGA TEVAR *alias* VALABA TEVAR, Respondent.

The plaintiff, as the eldest surviving male representative of the *Istimrar Zemindar* of Shiva-gunga, sued for a declaratory decree establishing his right to succeed to the zemindary upon the death of the first defendant; and for maintenance.

Held that the plaintiff had a right to institute the suit. The daughters of the first defendant were not her rightful successors to the zemindary, and that the plaintiff, as the eldest grandson of the *Istimrar Zemindar*, was entitled to be, preferably to the 2nd defendant, declared reversionary heir to the zemindary on the death of the first defendant.

According to Hindú law when the sons of daughters succeed to the property of their grandfather, they take by *direct* right of succession, as being his nearest heirs, like the *sapindas* of a man succeeding to his property on the death of his widow, but *per capita*.

Unmarried or married daughters, on whom as a class paternal property devolves, take a joint life-interest with rights of survivorship. The estate of inheritance passes from their father to the sons of all the daughters as his nearest heirs; and on the death of the last surviving daughter the (daughter's) sons take the property equally.

The plaintiff as the eldest surviving male representative of the *Istimrár zemindar* of Shiva-gunga, sought for a declaratory decree establishing his right to succeed to the said zemindary as next upon the death of the first defendant, and adjudging her to pay him Rs. 60,000 per annum for maintenance, and further declaring his right to immediate possession of certain apartments in the palace of the zemindary, which belong to his maternal grandfather and mother, and in which they resided during their life-time.

The plaint alleged that the first defendant was put into possession of the said zemindary by virtue of the decree* of Her Majesty in Council, bearing date the 30th of November 1863, as the sole

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* In *Kattama Nanchear* versus *the Rajah of Shiva-gunga*. See Sutherland's Privy Council Judgments, page 520.

surviving daughter of Gauri Vallava Tevar, otherwise called the *Istimrar zemindar;* that the 3rd, 4th and 5th defendants (daughters of the 1st defendant) were childless widows, and (her son) the 2nd defendant, a minor of the age of 13 years; that the zemindary was impartible, and capable of enjoyment by only one member of the family at a time, and that the plaintiff, as the eldest surviving grandson of the zemindar had a vested right to it, and was entitled to the succession upon the death of the first defendant, according to Hindú law, and customs which govern the succession of principalities or the said principality; and that the 1st, 2nd, 3rd, 4th and 5th defendants and others had combined to defraud the plaintiff in respect of his right to the zemindary, &c.

The Civil Judge passed the following decree:—

My decree is, that as between plaintiff and second defendant (grandsons of the first defendant's father,) plaintiff be declared next in succession to the Shiva-gunga zemindary and that plaintiff's claim to maintenance and apartments be dismissed.

The 1st, 2nd, 3rd, 4th, and 5th defendants appealed to the High Court.

The Court delivered the following Judgments:—

Scotland, C. J.—The grounds of appeal relied upon are—That the plaintiff could not maintain the suit for declaration of his right to be the next successor. But if the suit was maintainable, the decree ought to have declared either that the first defendant's son (2nd defendant) had the preferable right, or that the zemindary was *stri-dhun* property of the first defendant, and her daughters (3rd, 4th and 5th defendants), therefore were her rightful successors.

There is happily no dispute as to the important facts of the case. Dara-singa Tevar, the plaintiff, is the eldest surviving son of Vella Nachiar the only daughter of the *Istimrar zemindar* by his senior wife. The first defendant, the zemindarni, is the youngest of his two daughters by his third wife. He had also a daughter by his 2nd wife and another by his 6th wife. When the first defendant obtained possession of the zemindary under the order* of Her Majesty in Council establishing the right of the daughters of the

* See the judgment of the Privy Council in Kattama Nachiar v. Rajah of Shivaganga, Moor. Ind. App. Vol. IX, p. 539.

Istimrar zemindar to succeed to the zemindary on the death of his surviving widow Angamutu Nachiar, she was the only survivor of the Istimrar-dar's five daughters.

Before Angamuttu's death the first defendant was twice married, and it is admitted on both sides that the marriages were proper by the custom of the *Maravar* caste, to which the family belonged, and were both valid. The 3rd defendant is the only child by her first husband, and the 2nd, 4th and 5th defendants are her son and daughters by her 2nd husband. Both her husbands are dead.

I am of opinion that the first ground of objection cannot be supported. It has been decided by this Court that the rule of the equity Courts in England is not applicable to declaratory suits here, and it is now settled that a suit praying nothing more than a declaration of title is maintainable under the 15th Section of the Code of Civil Procedure although no consequential relief be grantable upon the declaration, if a ground for seeking the protection of such a suit is shown to exist.

Then as to the substantial objection to the declaration made by the decree; the question to be considered is, whether, when paternal property descends to the survivors or survivor of several daughters, the sons of all the daughters, or only the son or sons of the daughter or daughters in whom the property vested, are, or is, entitled to succeed as the heir or heirs of their grandfather.

I think it is clear, that as respects the reason upon which the law rests, the argument on behalf of the appellant is supported by the weight of the authoritative texts and commentaries of the Benares and Bengal schools; although the schools differ, perhaps as to the extention of the reason to the barren, and sonless, widows. See *Smriti-Chandriká* (Krishna Swamy's translation) Chap. XI, Sect. 2, Sl. 10; *Dáya-krama-Sangraha,* Chap. I, Sect. 3, *Dáya-bhága,* Chap. II, Sect. 2; 1. Stra. H. L. 138. In Chap. II, Sect. 2, of the Mitáksharâ, which treats of the right of daughters to inherit, this reason is not explicitly declared, but it is, I think, implied.

Consistently with this reason the same authorities establish, I think, that when the sons of daughters succeed to the property of their grandfather, they take by direct right of succession as being his nearest heirs, like the *sapindas* of a man succeeding to his

property on the death of his widow, but *per capita.* The rule of succession exists as laid in the *Dáya-bhága*, "*á fortiori* in the case of the daughter and grandson whose pretentions are inferior to the wife's" (See the *Madhavíya* commentary by Mr. Burnell, p. 26): and it rests upon the great principle of the entire Hindú Law of succession to property, that nearness in regard to the attributed capacity and sacred duty to confer spiritual benefits by the offering of funeral oblations, either immediately or mediately, confers the right to inherit temporal wealth. Now it is beyond question that all sons of daughters are accounted to possess the virtue to confer such benefits with like efficacy. The general ordinance declared is, that in regard to the obsequies of ancestors, daughter's sons are considered as son's sons. (Mitákshará Chap. II, Sect. 3, Sl. 6; *Smriti-chandriká* Chap. II, Sect. 2, Sl. 10); the *Madhavíya Commentary*, Sl. 37. In principle then, the law does not admit of the succession of some of the sons of daughters to the exclusion of the others.

The rule laid down in the *Dáya-bhága* Chap. XI, Sect. 2, Sl. 30,* and the *Dáya-krama-Sangraha* Chap. I, Sect. 5, Sl. 3, that married sisters succeed after the paternal property had been vested in a maiden daughter, only on her death without issue, appears to be the single rule which favors the exclusive succession of the sons of a daughter in whom the paternal property actually vests. Mr. Macnaghten in his "*Principles of Hindú law,*" states as a settled distinction between succession of maiden and married daughters according to the law of Bengal, that if the former marry and die, leaving sons and sisters or sister's sons, her sons alone take to the exclusion of the sisters and their sons.* But he adds "this distinction does not seem to prevail anywhere but in Bengal." At present I have a strong impression that the Hindú law governing here does not recognize such distinction.

In effect, as it seems to me, that the heritage is unobstructed when there is male issue of any daughter, because the rights of such issue exist simultaneously with the interest of the daughters. There is no allusion to a preferential right of the sons of any one daughter, and nothing expressed is inconsistent with the sons of several daughters sharing the inheritance.

* But See *Vyavasthá Darpana* (2nd. Ed.) pp. 170, 171, 1062, 1063.

For these reasons I am of opinion, that unmarried or married daughters, on whom as a class paternal property devolves, take a life-interest with rights of survivorship,—that the estate of inheritance passes from their father to the sons of all the daughters as his nearest heirs; and that on the death of the last surviving daughter, the sons (of daughters) take the property equally; and consequently, that the plaintiff being the eldest surviving grandson of the *Istimrar zemindar*, is the heir, having right to succeed to the property in dispute on the death of the *zemindarni*, the first defendant.

With respect to the second question raised by the appellants' objections to the declaration of the plaintiff's right, whether the zemindari is the *stri-dhunum* property of the first defendant, I need not add any thing, as my conclusion of the first question is obviously decisive of it. But I ought perhaps to say with reference to the arguments advanced on behalf of the appellants that the authorities do not, I think, present any ground for them. There are some texts and comments recognising as *stri-dhunum* paternal property devolving on a daughter, but they appear to me to relate only to an *appointed* daughter who was declared to become by the appointment the third description of son, Mitákshará Chap. I, Sect. 11, Sl. 13, and Chap. II, Sect. 2, Sl. 5, *Dáya-bhága,* Chap. II, Sect. 2, Sl. 10, 16—and they are of no force now, the appointment of a daughter, having become obsolete, as to other daughters.

I can find no recognition of a similar kind, and it is expressly declared in the same section of the *Dáya-bhága* Sl. 30, and in the *Dáya-krama-Sangraha,* Chap. I, Sect. 3, that paternal property does not become their *stri-dhunum,* and in the passages cited from the *Vír-mitrodoya* the contrary position is refuted.

The fundamental principle of the law of succession, too, is adverse to the contention of the appellants, for if the paternal property passing to a daughter were to become her *stri-dhunum,* the succession would pass away from those who were the nearest heirs by virtue of their capacity to offer oblations to the last male owner.

On these grounds I am of opinion that the decree of the Civil Court is right and should be affirmed, but without costs.

Mr. Justice Holloway rested his judgment upon the same ground. Towards the end of it he said :—

"On the question whether property coming to a woman by inheritance is *stri-dhunum* or not, I do not consider it of the least consequence for the decision of this case to determine. By calling it *stri-dhunum*, we should not be in the least assisted to the solution of the order of its transmission, for the various sorts of *stri-dhunum* are transmitted in various ways. I will shortly sum up the grounds upon which I come to the conclusion that the decree of the Civil Judge ought to be affirmed."

The learned Judge then states the grounds to be :—

"1. The principle of the law is to determine the descent by the nearness or remoteness of connection with the offering; there is no taking by or through or by virtue of any individual; the only effect of relationship is to connect with that offering; the very name *sapinda* is the clearest etymological proof of the predominant notion."

"2. That this principle is the reason for the daughters taking at all."

"3. That neither in this, nor in any other case, has what is called vesting the slightest influence; the very notion of heritable blood is, as applied to Hindú Law, meaningless."

"4. The principle of the law is the only safe ground for deducing a rule of descent."

Mad. H. C. Rep. Vol. VI, p. 310.

Under the Hindú law, where property is proved to be a separate and divided property, the daughters and daughter's son are the legal heirs entitled to it, and not more remote relations to the deceased.—*Burriyar Singh* and others v. *Mussummat Hunsee* and others.—Agra Rep. Vol. II, A. C. p. 166.

After daughters are exhausted, daughter's sons succeed, but not till then.—*Sastri Anandyan* v. *Vengumal.*—Mad. S. R. for 1861, p. 137.

The sons of a daughter cannot succeed to the estate of their maternal grandfather till after the death of their mother. They are entitled to sue for their rights within twelve years of the

death of their mother, and to require the period of their minority to be taken into consideration according to Section 11 of Act XIV of 1859.—*Kummul Sha Bennik* v. *Ramjee Sha Bennik*,—S. W. R. Vol. II, p. 277.

(According to the Mahratta School :)

Grandsons (sons of a daughter) were decided under a *Vyavasthá* not to succeed to the property of their maternal grandfather during the life of a daughter-in-law (widow of a son,) he having no other heirs.—*Maha Luksmee* v. the grandsons of *Kripa-shookul*.—Borr. Rep. Vol. II, p. 510. (Morl. Dig. Vol. I, p. 306.)

SURJA KUMARI, and others, Appellants,
versus
GUNDHARP SINGH and others, Respondents.

MADHU-SUDAN SINGH, Appellant,
versus
The same, Respondents.

The author of the *Vivâda Chintâmani*, a Mithila work, has omitted the daughter's son from the series of heirs ;* but according to the other authorities, including the Mithila legal writers, the right of the daughter's son next to the daughter is declared. The Sudder Dewanny Adawlut adjudge that the daughter's son is heir, disregarding his omission in the said work, and thus ruling that the position in the *Dáya-krama-sangraha* that the daughter's son according to the Maithila writers is not an heir, is erroneous. This position seems to have been adopted by Sir W. H. Macnaghten in his Hindu law, without sufficient investigation.

Surja Kumari (the surviving daughter of Allap Singh,) in association with Madu-sudan Singh, her sister's son, brought in the Zillah Court, the action whence arose these appeals. They rested their right on title by inheritance under the Hindú law. The defendants joined issue on the point of law, asserting that by the Hindú law, as received in *Tirhoot*, the agnate kin of a deceased Hindú excluded his daughter and daughter's son.

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* The author of the *Vivâda Chintâmani* has not omitted the daughter's son from the series of heirs, but has placed him after the father. See. Vi, Chi. p. 299.

On the 23rd of March 1833, the case came on for trial before the Judge, who passed this judgment. "Let the plaintiff Surja Kumari recover, and, under an injunction not to alienate during life, enjoy the property claimed, receiving the profits in deposit. The other plaintiff has no interest in the estate of his maternal grandfather.

From this decision the two plaintiffs preferred separate appeals to the Court of Appeal at Patna. The defendants also appealed.

On the 13th of April 1833, the three appeals being conjoined came on for trial before Sir James Harington, a Judge of the Court. He found that Alap Singh had succeeded to his father's estate, which he had held distinct and separate. He proposed, therefore, to reverse judgment of the Lower Court, and to decree the property, claimed, to the two plaintiffs in equal shares, with provision that the share of Surja Kumari should be considered as her estate heritable by her son.

From this judgment both plaintiffs by separate petitions to the Sudder Dewanny Adawlut applied for Special Appeals.

Both appeals were referred for trial to Mr. W. Money, Officiating Judge of the Court, and, being conjoined, came on before him on the 24th, December 1836, when he directed the Pundit of the Court should be required to expound the law on a statement of facts which recited that Alap Singh was an inhabitant of the Tirhoot district. This reference produced from Voidya Nath Misr, the Pundit, an exposition of the law, stated to conform with these and other authorities current in *Mithila*, *viz.*, *Manu*, *Vivâda Chintâmani*, *Vivâda-Chandra*, *Vivâda-Ratnâkara*, *Kalpa-taru*, *Madana-Pârijâta*, and *Smriti-Sâra*. Its substance is this—"In the three last named works, to the estate of a man who has died without male issue, the daughter's son is mentioned as the heir next to the daughter who follows the wife, but he is not so mentioned in the first two works."

The undermentioned extracts were recited as indicating a conflict of doctrines in regard to the right of the agnate kin distant in the 3rd and 4th degrees:—

Extract from the Kalpa-taru:—

1. In this, the text of *Vishnu* reciting the series of heirs to him who died without male issue is quoted. In it the daughter's

son is placed next to the daughter, and before the parents and collateral kin in the male line. The author adds that, "after the daughter and daughter's son," *Vrihaspati* provides "failing him the brother," &c.

Extract from the Madana-párijata :—

In this, the author propounds the right of the daughter's son after the daughter. He cites *Vishnu's* text, which provides for the succession of the daughter's son on failure of other issue, because, in regard to the obsequies of ancestors, sons of daughters are considered as sons of sons (*vide* Trans. *Mit*, Chap. II, Sect. 3, Sl. 6.*) He adds that the particle "also" [*eva*] in the expression "daughters also" occurring in the text of *Yájnyavalkya* imports the same meaning [vide *idem*]; and that failing the daughter's son the parents take the estate.

Extract from the Viváda-Ratnákara :—

3. After the daughter and daughter's son *Vrihaspati* proceeds "failing him the brother," &c,

4. Text of *Yájnyavalkya* cited in the *Vivada-chintámani, Viváda-Ratnákara, Vidáda-chandra,* and other books. "The wife, the daughters, also the parents," &c.

5. Text of *Vishnu* cited in the same works. This varies from the same text cited in the first authority by omission of the clause in favor of the daughter's son.†

Extract from the Viváda-chintámani :—

6. At the close of the Chapter on succession the author recapitulates the series. In the passage as quoted by the *Pundit* the daughter's son is omitted.

Extract from the same work :—

7. It precedes that given as the 6th authority. It recites a text of *Vrihaspati*‡, and a text of *Manu*§.

* Mr. Colebrooke in a note on this text says that it is not found in *Vishnu's* institutes, but cited as his in the *Smriti-chandriká* and *Dáya-Krama-Sangraha. Vide Dáyá-Bhága,* Chap. xi, Sec. 11, para. 23, and *Mit.* Chap. ii, Sec. 3, para. 6. It may be a text of the elder *Vishnu.*

† It is thus cited in the copy of the *Dáya-Bhága,* from which Mr. Colebrooke translated. He, however, notices the reading which has the clause in favour of the daughter's son (*Vide Dáya-Bhága,* Chap. xi, Sects. 1 and 5.) With this clause it is cited in the Digest. The text is not metrical, and therefore more susceptible of corruption.

‡ *Vide* translation, *Dáya-Bhága,* Chap. xi, Sects. 2, 5, 17, and Digest, Book V, C. iv, Sec. 224, the Section treating on the appointed daughter.

§ *Vide* idem, para. 19.

The first declares that existence of kin notwithstanding the daughter's son is entitled to her father's estate just as she is so entitled. The second declares that the daughter's son takes the estate of her father who left no male issue, for he offers oblations to him. The author adds that "for the sake of conformity with the text of *Yájnyavalkya,* these texts must be understood as applicable to the case where the heirs, of whom the mother is first [*Mátrádi*], exist not."

This exposition of the law was read and argued before Mr. W. Money and Mr. Rattray on the 23rd February 1837. Another exposition of the law by *Ram Joy,* a Pundit of the Supreme Court, was received on part of Madhu-sudun appellant. In this he argued that it was the intention of the authors of the *Viváda-ratnákara, Vivâda-chintámani,* and other Mithila works to place the daughter's son next to the father.

The Judges reversed the judgments of the Lower Courts, and decreed that Madhu-sudun should recover the moiety of the estate for which he had sued in conjunction with the other appellant.

The substance of the reasons stated in the support of this judgment was as follows:—

The District of Tirhoot is in the tract called *Mithila.* If a Hindú of that district has died without male issue, wife or daughter, according to the Hindú law as there current, is the daughter's son his heir in preference to other kin? This is the point at issue in the case. The *Vyavasthá* of the Pundit establishes the preferable right of a daughter's son, the texts cited in the 1st, 2nd, 3rd and 7th proofs are conclusive on this point. In the texts cited in the 4th, 5th, and 6th proofs the daughter's son is not expressly mentioned, but his exclusion from succession, contrary to the expressed sanction of the majority of authorities in his favor, cannot be established by the omission.

On the part of the appellant it has been urged that the text cited in the 4th, 5th, and 6th proofs are weak or inaccurate, and insufficient to sustain the case of the respondents, and the argument seems *well founded.* The translations of Mr. Colebrooke show that by approved texts the married daughter and maiden daughter are preferred as heirs to the widow daughter. The ground of this preference is, that the two former may have sons who will benefit their

maternal grandfather by the performance of rites. It seems then absurd to hold that an existing daughter's son should be excluded when his probable birth even would be ground of preference to be shown to his mother. There can be no doubt as to the equal interests of Madhu-sudun and of his aunt conjoined with her son in the estate of Alap Singh.

Remarks:—

The enquiry in this case removes a common error, that by the legal writers of *Mithila* the daughter's son is not recognized as an heir. It is evident that Sir W. H. Macnaghten had not duly investigated the subject. He probably adopted his position on credit from Sri-krishna, the author of the *Dáya-krama-sangraha,* who is the recorder, if not the inventor, of the error.

At the close of the section Jagan-nath recites as the recapitulation of Missr a series of heirs, in which, contrary to the 6th proof of *Vaida-náth Missr,* the daughter's son is mentioned next before the cognate kin.

The difference is that Ram Joy, more correctly construing the word as used in the text, places the daughter's son before all the kin, but after the parents.

Váchaspati Missr, comparatively, is a modern *Mithila* writer, and however respected he may be for his learning, his authority for the exclusion or degradation of the daughter's son cannot avail against the many strong texts of *Munis,* decisive of his right, and the concurring opinions of expounders including writers of *Mithila.* In his initial verses he *(Váchaspati Missr)* professes to compile his work after attentive consideration of the *Kalpa-taru, Viváda-Ratnákara,* and other works, yet (according to what seems to be the most approved reading of his work,) contrary to the authority of these works he passes by the daughter's son without any explanation or discussion. In placing the mother next to the daughter, he cites decisive texts in favour of the daughter's son, which he admits do not regard the son of an appointed daughter. Next to the mother he locates the father, and he then proceeds to say, that the right of the brother is also on account of the prose text of *Vishnu.* In his recapitulation, (according to what seems the most approved reading,) he has also omitted the daughter's son. It seems, therefore, that *Váchaspati Missr* has omitted the daughter's

son from the series of heirs,* but in a mode which exposes him to the imputation of ambiguity and inconsistency.

The two appellants originally sued jointly as possessing equal rights. The appellant Surja Kumari did not oppose the claim of her nephew, but on the contrary continued to acquiesce in it. Therefore, although the equality of their rights has been adjudged, under such circumstances the judgment has not the virtue of a precedent applicable to any future litigation between a daughter and a daughter's son in regard to the estate of the father of the one, and the maternal grandfather of the other.†

Sel. R. S. D. A. Vol. VI, p. 142 *et seq.* (New Ed. pp. 168—179).

A daughter's son is one of the nearer *sapindas*, and in the lines of heirs before a brother's son, according to Hindú law.—*Krishnamma* v. *Papa.*—Mad. H. C. R. Vol. IV, p. 234.

According to Hindú law current at Benares, the daughters' sons inherit in default of qualified daughters, and that, if there be sons of more than one daughter, they take *per capita*, and not *per stirpes*. The widow of the deceased was incompetent to modify the term of the original transaction injuriously to the reversioners.

The plaintiff is equitably entitled to recover the profits of the share adjudged to him, from which he has been unjustly excluded in consequence of his grandmother's illegal proceedings.—*Ram Surwath Panday* and others v. *Basdeo Singh.*—Agra Rep. Vol. II, a. c. p. 168.

Admitted Legal Opinions.

A man cannot claim his maternal grandfather's property while his mother is living.

Q. A person brought an action, claiming his maternal grandfather's property, while his mother was living, and there was a possibility of her bearing more children. In this case, was the grandson entitled to a judgment for the property?

R. The plaintiff's mother has exclusive right to the property

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* See the footnote in page .454

† A daughter's son cannot succeed simultaneously with a daughter, or so long as a qualified daughter exists.

claimed; consequently, the plaintiff cannot be considered in the light of an heir to the deceased, so long as his mother survives.

Zillah 24-Pergunnahs.—Macn. H. L. Vol. II, Chap. I, Sec. iii, Case 15.

Where the family is separated, the daughter's son takes the estate, to the exclusion of the uncle and uncle's son.

Q. A person of the *kayustha* or *cait* class, was survived by his three sons A, B, and C, who took possession of their father's estate: subsequently the eldest son (A) died, leaving a son who was in the enjoyment of his father's share; and then the second son (B) died, leaving a son. The third son (C) is still living. The son of the eldest son died, leaving a daughter and her two sons. These two grandsons claim one-third of the estate, being their maternal grandfather's legal share, but their mother is still living. Under these circumstances, supposing the eldest brother's son to have enjoyed the property without having come to any division of it with his two uncles, on the death of such eldest brother's son, will his property devolve on his uncle C, on his other uncle's (B's) son, or on his own daughter, or on his daughter's sons whose mother still survives? Supposing the property to have been divided, and that they lived apart, in this case, should that portion which the eldest brother's son possessed, devolve on his daughter or daughter's sons, or on any, and what other person? and generally, whether the eldest brother's son lived together or apart from his uncles, and died leaving the individuals above specified. What is the law as to their respective rights of succession?

R. The order of the heirs of a separated and not reunited individual is thus laid down by *Yájnyavalkya*: "The wife and the daughters also, both parents, brothers, &c. This rule extends to all persons and classes."*

By the import of the particle "also," the daughter's son succeeds to the estate, on failure of daughters. "If a man leave neither son, nor son's son, nor wife, nor (female) issue, the daughter's son shall take his wealth. For, in regard to the obsequies of ancestors, daughters' sons are considered as sons' sons."

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* It would have been *vice versâ* according to the law of Benares, had the family been joint and undivided.—Note by Sir W. Macnaghten.

The estate of a person deceased who was separated from his co-parceners, and not re-united with them, first goes to his widow; in default of her, to the daughter, as *Kátyáyana* says: "Let the widow succeed to her husband's wealth provided she be chaste; and, in default of her, let the daughter inherit, if unmarried."

On failure of these heirs, the mother takes the inheritance; in default of her, the father is successor; the uterine brother takes the heritage at the father's death; in default of a brother of the whole blood, the half-brother becomes heir.

Menu:—"Of a son dying childless, *and leaving no widow*, the father and mother shall take the estate: and the mother also being dead, the paternal grandfather and grandmother shall take the heritage, *on failure of brothers and nephews*."

To the nearest kinsman (*sapinda*) the inheritance next belongs.

Among the *sapindas*, he who is nearest is entitled to succession, and he who is remote is excluded by the nearest: such is the meaning of the text.

Accordingly, *Vrihaspati* says: "Where many claim the inheritance of a childless man, either paternal or maternal, of more distant kinsmen, he who is the nearest shall take the estate."

According to the preceding passages of *Menu, Vishnu, Vrihaspati, Kátyáyana* and *Yájnyavalkya*, it is determined, that supposing the eldest brother's son to have separated from his uncles, and not to have been re-united, his estate will go first to his daughter, and, in default of her, his grandsons in the female line will take the inheritance; but, if the property was held in joint tenancy, or if he, after separation, became re-united with his paternal relations, then his property would devolve on his uncle and uncle's son, because they are his *sagotras* and *sapindas*.

This opinion is conformable to the *Mitákshará* and *Vyavahára-Mayúkha*.

Bareilly Court of Appeal—Macn. H. L. Vol. II, Chap. 1, etc. ii, case 13.

SECTION IV.

RELATIVE TO PARENTS.

The mother succeeds in preference to the sister, in default of sons, widow, and daughter. The mother thus inheriting to the son, the inheritance will descend after her death to *his*, and not to *her*, particular heirs, and she cannot alien, during her life, to their prejudice.—*Rama-Swami Modeliar* v. *Vallatha.*—The 2nd of August 1813. Strange's Notes of cases, Vol. II, p. 211.—Morl, Dig. Vol. 1, page 322. Norton's Leading Cases, Part II, p. 557.

MADRAS H. C. A.*—*The 8th of June* 1865.

P. BACHIRAJU, Appellant,

versus

V. VENKATAPADU, Respondent.

According to Hindú law a mother inheriting from her son has not an absolute property in the estate, but merely a life interest, without power of alienation.

This was a special appeal from the decision of C. Collett the Civil Judge of Vizagapatam.

JUDGMENT :—The facts of this case and the questions at issue in it have been so clearly set out by the Civil Judge that it is not necessary that we should recapitulate them.

The case comes before us now on special appeal mainly upon two grounds: first that Kamama having entered upon the property in succession to her deceased son took it absolutely and with unfettered power of alienation ; second, that there was no evidence of fraud in the transfer made by Kamama to defendant of the property which forms the subject of the claim.

The general doctrine in Hindù law in regard to the succession of property other than her peculiar property which has devolved on a woman is that those succeed her who would have been heirs in her default, or that her estate is an estate interposed for life between that of the last absolute proprietor and his next heir.

The Mitákshará, however, the guide to the laws of Southern India, enunciates the peculiar doctrine that property which devolves on a woman by inheritance is classed with *Strí-dhana* ; the effect of the doctrine being of course to give her absolute property in it and to change the line of descent.†

* *Present* : Frere and Innes. J. J.

† Not so : see Widow's Succession in Part I, the Principles of Hindú Law.

In *Sir Thomas Strange's* Hindú Law, Edition of 1825, pages 165 and 166, he points to the distinction between the Bengal law, and that of Southern India in this respect.*

Sir Thomas Strange says:—"Had the property been the mother's in the Hindú sense of woman's property, it would descend on her death to her daughters, but having been inherited by her from her son, it passes according to the law, as practised in Bengal, not to her heirs, but to his. According to the Mitákshará which is followed in this respect by other authorities in the Southern India, so vested it classes as *stri-dhana* and descends accordingly under the rules of inheritance for the property of that description to her daughters and not to her sons; but according to the doctrine of the *Smriti-Chandriká* the right of inheritance is vested in different persons, as it was acquired before or after coverture.

The passage in the Mitákshará to which reference is here made is as follows:—"That which was given by the father, by the mother, by the husband, or by a brother; and that which was presented (to the bride) by the maternal uncles and the rest (as paternal uncles, maternal aunts &c.,) at the time of the wedding before the nuptial fire, and a gift on a second marriage, or gratuity on account of supercession, as will be subsequently explained, and *also property which she may have acquired by inheritance*, purchase, partition, seizure or finding, are denominated by *Manu* and the rest 'woman's property' (Chapter II, Section 11, para. 2)." A reference to the passage of *Manu* alluded to shows, however, that that source of all Hindú law has not especially included property *inherited* among the classes into which he divides the *stri-dhanam*.

The passage runs thus:—"What was given before the nuptial fire, what was given before the bridal procession, what was given in token of love, and what was received from a brother, a mother or a father, are considered as the six-fold separate property of a married woman." Chapter IX, *Shloka* 194.

In para. 4, Section xi, of Chapter II, of the Mitákshará it is explained that, when *Manu* speaks of the six-fold property of a woman the intention is not to restrict the meaning to property of a

* Only part of this passage is found in Mayne's edition, page 144, where the practice of the Bengal School is stated, but the distinction taken by *Sir Thomas Strange* between it and the School of Southern India is (probably by accident) omitted.

denomination unquestionably falling within the six classes which he has enumerated, but is merely by way of declaring that there was no less than six kinds of such property, while there might be many more. And this view of the author is supported by the passage in *Manu* immediately following that just quoted. It is as follows:—"What she received after marriage from the family of her husband, or what her affectionate lord may have given her, shall be inherited, even if she die in his life-time, by her children." (*Manu* Chapter IX, 195.)

There is, however, no allusion in *Manu* to the doctrine of the Mitákshará, that property devolving on a woman by inheritance is *Stri-dhanam*.

And it is remarkable that while the Mitákshará in paras 5, 6 and 7 of Section xi, Chapter II, enlarges upon the legal proposition laid down in para 2, and quotes authorities in support of those parts of it which relate to gifts to a woman before or after marriage from her kindred and from her husband's family, no illustration whatever is given of the bare declaration that property acquired by inheritance also comes under the head of *Stri-dhanam*. In the Digest of Jagan-natha, in the Chapter on woman's property (Book V, Chapter IX) no allusion whatever is made to the doctrine, nor among the multitudes of other authorities quoted is this passage of the Mitákshará even so much as referred to.

The law as to the estate which a Hindú widow has in property devolving on her on the death of her husband without male issue has been long ago well settled, and unless there were some more clear exposition of the law than the above passage from the Mitákshará, or the authority of decided cases showing that the estate held by a mother in property which has devolved on her from her son whose wife has predeceased him and who has no issue, is larger and stands upon a different footing from that of the widow, we should hesitate to say that it was so. The cases in this precedency in which this point has been directly decided must have been exceedingly rare, as none is to be found in the reports. We may refer, however, to the case of *Doe on the demise* of *Rama-sami Moodaliar* v. *Vallata*, reported page 211, Vol. II. of Sir Thomas Strange's notes of *cases decided in the Madras Supreme Court.** This case was decided in 1813

* *Ante* page 462.

while Sir Thomas Strange was Chief-Justice, and the point in question was therein considered. In the judgment the following passage occurs:—"It seemed settled indeed that, the mother thus inheriting to her son, the inheritance would descend after her death to *his,* and not to *her*, peculiar heirs; and that she could not alien during her life to their prejudice." This was not the point directly in question in the suit, and the Digest of *Jagan-nátha,* and not the Mitákshará, is quoted in support of the opinion thus thrown out; but that the Chief Justice had the Mitákshara before him at the time and had access to the passage containing the opposite doctrine is evident from the judgment itself and the foot notes to it in which the Mitákshará is several times quoted in support of other positions.

We think, therefore, that this is an indication of the opinion *Sir Thomas* Strange had arrived at as to what the practice of the law upon this point was in the Madras Presidency, and that his view was that, however authoritative the teaching of the Mitákshará and text-books of the same school might in general be, they were not to be followed in this particular point.

Among the cases quoted in Morley's Digest under title "Inheritance," sub-title "Parents," not a single instance is given of the doctrine of the Mitákshará upon this point having been followed, though the question must frequently have been raised at Benares and other parts of India where what is called the Benares School prevails, the great authority of which is the Mitákshará. In the absence therefore of any distinct authority in support of the doctrine of the Mitákshará, which, not having been illustrated or explained, leaves us in doubt whether the author attached as wide a meaning to the words "acquired by inheritance" as they naturally admit of, we think that the law upon this subject of the Madras Presidency follows the general rule of Hindú law; that property so devolved is not *stri-dhanam,* and does not follow the law of succession peculiar to property of that kind. It follows, then, that the mother inheriting to her son has not an absolute property in the estate, but takes merely for life and has no power of alienation.

We, therefore, affirm the judgment below and dismiss the appeal with costs.*—Mad. H. C. Rep. Vol. II, p. 402.

* "This," says Sir John Norton, "may be regarded as the Leading case on this point in Madras."—See Norton's Leading Cases, Part II, p. 557.

Calcutta, S. D. A.—*The 22nd of March* 1847.

Present:

R. H. Rattray, A. Dick and W. B. Jackson, *Judges.*

Rughoobur Suhae, *versus* Mussummat Tulasee Konwur, and others.

It is admitted, that the ancestral property inherited by the brothers Bhowanee and Byjnath was divided between them in 1788; and with reference to this, appellant argues, that the mother of (Byjnath's son) Nursingh was his (her son's) heir; and that the property having thus passed into her hands by inheritance, would descend to her heirs, and not revert to her husband's, on her demise. Respondents maintain, that the mother of Nursingh never had more than a life-interest in the estate; but that, as long as she lived, that life-interest barred any claim on their part, and consequently the statute of limitation had in no wise been infringed by them.

The Court assume that the mother of Nursingh succeeded to the property, in her own right, on his death: it remains to be determined whether her succession to it was as *stri-dhun* (or woman's own property), or merely as holding a life-interest in it. In either case the statute of limitation has no application to the suit.

The respondents' vakeel refers to pp. 25 and 26 of Macnaghten's Hindú law (of inheritance) to show, that the heirs of the son would succeed on the death of the mother, not the mother's heirs; and cites the case of Mussummat Bijyah Debbea.—Sudder Dewanny Adawlut Reports, Vol. I, pp. 162—164.

We are of opinion that with reference to the authorities and facts before us, we do not entertain any doubt of the right of the heirs of Nursingh to succeed to the estate contested in preference to those of his mother, the widow of his father Byjnath Sahoo.—S. D. A. R., for 1847, p. 87.

A Hindú inhabitant of Bombay, entitled to separately acquired movable and immovable property, died leaving a widow, an infant son, three daughters and a brother. The son died in infancy and without having married.

Held, on demurrer, that the widow, as mother of the son, inherits his property, as to the movables absolutely and as to the immovables for life; with remainder to the sisters of the son as his heirs absolutely.

The word "parents" in the order of succession, as laid down in the Mitákshará, includes father and mother, and in like manner "brethren" includes sisters as well as brothers.*—*Vinayak Anund-rav* and others v. *Lakshmí-bai* and others.—Bombay H. C. Rep. Vol. I, p. 117.

BOMBAY, H. C.—*The 6th of October* 1869.

NARSÁPPÁ LINGÁPPÁ, *et al*, Appellants,

SANKHÁ-RÁM KRISHNA, Respondent.

Held that in a separated family a Hindú mother succeeding to her son's immovable property takes in it the same estate as a Hindú widow takes in the immovable property of her husband dying without male issue.

A Hindú died leaving by his first wife, who predeceased him, three sons, from whom he had separated, his second wife and a minor son by the latter. The minor son died in infancy.

Held that the mother succeeded to the immovable property of her minor son, but took only a life-interest in it.

GIBS, J.:—The question for us to decide in the present case is what right has a widow over the property which she inherits from her minor son, who, with herself, is a member of a divided family. Mr. Bhairava-nath points out to the Mitákshará as alluded to in the judgment of Mr. Forbes in *Nalval-ram Atma-ram* v. *Nund-kishor Shiv-narayan*† in which the following passage occurs in describing a woman's *stri-dhun* :—" Also property which she may have acquired by inheritance;" and argues that there is no limitation as to the person from whom the inheritance is derived; that, therefore, whether a woman inherits from her own family, or from the family of her

* This is the special doctrine of the Mahratta school or the Bombay Presidency, according to which a sister is heir to her brother who dies leaving no heir as far as his grand-mother, whereas according to the other schools a sister is no heir at all. This will be known from the main book and also from the Privy Council judgment by which the above decision is affirmed and which is hereafter given.

† *Ante* page 428.

husband, such inherited property equally comes under the head of *stri-dhun*; and that the case just quoted as well as the case of *Kullammal* v. *Kuppu Pillai* shows that a woman can dispose of such property absolutely. Before noticing the arguments of the other side, we remark that the question of a woman's *stri-dhun* going to her own heirs, and not to those of her husband, may be taken to have been authoritatively settled in this Court by the case quoted,* and the entire question before the Court turns on whether the son's property, when inherited by the mother, becomes part of her *stri-dhun*, or not. In the case of *Jamiyat-ram* v. *Bai Jamna*† the judgment of Sir Joseph Arnould, Acting C. J., pointed out that the property acquired by inheritance, and which in consequence becomes part of the widow's *stri-dhun* can only consist of property inherited by her *from members of her own family.* This view has been questioned by the learned editors of the Digest of Hindú law, Messrs. West and Buhler;‡ but whether their criticism is correct or not§, the decision which has been followed on several occasions is binding upon this Court as a precedent. Were it otherwise, we are of opinion that the very able argument for the respondent and the authorities cited have distinctly shown that the rule under which a widow succeeds to her son's separated property is the same under which she succeeds to her husband's in a divided family.|| Now the interest of a widow in her deceased husband's estate (he being a member of a divided Hindú family) has been authoritatively settled by this Court to consist of a life-interest only in immovables, while movables are taken absolutely: *Vináyak* v. *Lakshmi-bai*¶ and *Dev-kurvar-bai's* case.** We do not consider that Mr. Bhairava-nath has in any way met this argument, and in holding, as we do in the present case, we are only following the latest rulings of the High Courts of the two other presidencies.†† We consider therefore that

* Naval-ram Atma-ram *v.* Nund-kishor Shiv-narain, I. Bom. H. C. Rep. 209. See *ante* page 428.

† 2 Bom. H. C. Rep. 10. *Ante* p. 432.

‡ Introduction, page 65.

§ Certainly it is correct, and, in strict accordance with the Hindú law.

|| Mitákshará Chap. II, Sect. i, paras. 1 and 2; *Mayúkha* Chap. IV, Sect. viii, paras. 1 and 2; Stokes' H. L. B., pp. 83, 84 and 427.

¶ 1 Bom. H. C. Rep. p. 117. *Ante* p. 467.

** 1 Bom. H. C. Rep. p. 130. *Ante* p. 420.

†† 3 Cal. W. Rep. p. 140. Post, p. 469.—3 Mad. H. C. Rep. p. 312. (To be found in the Chapter on *stridhun.*)

Both these cases seem to be inapplicable here.

Radha-bai has, in the estate inherited from her minor son, taken only a similar interest to that which she would have taken had the estate come to her direct from her deceased husband, *viz.*, a life-interest in the immovable property. We agree, therefore, in the decision arrived at by the Lower Court.—Bom. H. C. Rep. Vol. VI, page 215.

CALCUTTA H. C.—*The* 17*th of July* 1865.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

PUNCHANUND OJHAH and others, (Defendants,) Appellants,

versus

LALSHAN MISSÉR and others, (Plaintiffs,) Respondents.

According to the *Mitákshará* and the *Viváda-chintámani all* property that a woman inherits does not thereby become *stri-dhun* so as, after her death, to descend to her heirs. Immovable property which, in default of other intervening heirs, has been inherited by a mother from her son, descends on the mother's death not to her heirs, but to the heirs of the son from whom the mother inherited it.

The point raised on this appeal is whether landed estate which, in default of other intervening heirs, has been inherited by a mother from her son, descends on the mother's death to her heirs, or whether it descends to the heirs of the son from whom the mother inherited it. There is no question as to the law which prevails in Bengal. It is admitted that the son's heirs will inherit in Bengal, and that the mother possesses only a life-interest in the son's estate similar to the interest possessed in her deceased husband's estate by a widow. But it is said that the Mithilá and Mitákshará laws differ from that prevalent in Bengal upon this point; and that according to those laws, the estate inherited by a widow from her husband and by a mother from her son, thereby becomes her *stri-dhun;* and that the heirs, after the widow's or the mother's death, are the widow's or mother's heirs, and not the heirs of the husband or of the son.

Baboo Dwarka Nath Mitter, who contends for this view of the law, supports it by the Mitákshará, Chapter on *stri-dhun,* pp. 365

to 367, Colebrooke's Edition, and by Baboo Prosunno Coomar Tagore's translation of the *Vivâda-chintâmani,* in which the author of that work gives a table of succession according to the Mitâksharâ.

The eleventh Chapter of the Mitâksharâ details the different sorts of property which come under the denomination of *stri-dhun,* or the separate property of a woman. The first Section details it to consist of all gifts made to a woman by her father, mother, husband, or brother, or received by her at her marriage, or on her husband's second marriage, or any other separate acquisition. The second Section repeats this definition, and, instead of the words "separate acquisition," it adds also "property which she may have acquired by inheritance, purchase, partition, seizure, or finding, are woman's property." The third Section lays down that the term woman's property conforms in its import with its etymology, and is not technical: for, if the literal sense be admissible, a technical acceptation is improper. The fourth Section goes on to say that the enumeration of the different sorts of woman's property, as above given, is not intended as a restriction of a greater number, but a denial of a less. Baboo Dwarka Nath Mitter especially relies upon these passages as proving that all estate which devolves upon a mother or widow, even by inheritance, thereby becomes *stri-dhun* according to this law, and he further points to the eighth Section as proving that, after the death of the mother or the widow, her heirs take it. "Her kinsmen take it, if she die without issue." Subsequent Sections lay down who her kinsmen are. In the *Vivâda-chintâmani,* Chapter on the table of succession prepared by the translator, Baboo Prosunno Coomar Tagore, in the 12th Rule, the following is laid down:—"Any property which a woman inherits is her *stri-dhun,* that is, peculiar property. Hence any property of her husband which she inherits shall, on her death, be received by the heirs of her peculiar property. But such property cannot, according to the *Smriti-sâra,* be her *stri-dhun.* Hence the heirs of her husband shall receive it. If the mother die after inheriting her son's property, such property becomes her *stri-dhun.* Hence the heirs of her peculiar property get it."

It would appear, then, that the above-named translator of the *Vivâda-chintâmani* would make a distinction between the pro-

perty which is inherited by a widow, and the property which is inherited by the mother. At least it is not quite clear from the twelfth paragraph above quoted, whether he rejects the rule as laid down in the *Smriti-sára* or not. This work is one of those works upon which he relies as laying down the law of succession; and he points out what is the rule as laid down in that work. It may be, however, that the translator, Baboo Prosunno Coomar Tagore, merely mentions it as a discrepancy, and adopts the general rule as Baboo Dwarka Nath Mitter contends for it.

We must, however, decide the question before us on the law as laid down in the Mitákshará and in the *Vivâda-chintámani*. The opinion of Baboo Prosunno Coomar will be well considered; but, if it is contrary to the text, we must reject it. It seems to be quite clear, from the fact that there is a distinct Chapter in the law on the woman's separate property, that there is some distinction between the different sorts of property obtained by women. There is certain property denominated specially *stri-dhun* regarding the inheritance to which a different rule of succession prevails from that which prevails as regards other property. It is quite clear that the different rule of succession is laid down, not because the woman was the last owner, but because the property is of a special description, and the special description of property is very carefully enumerated.

We think the text clearly confines *stri-dhun* to be some sort of special separate property.

The property of her husband or her son, to which a woman may succeed as heir for her life-time, is nowhere laid down in the text as thereby becoming *stri-dhun*. If the law of the Mitákshará on this point was so different from that prevalent in Bengal, as is contended, the commentators would have distinctly laid down the discrepancy. As a general rule, the laws may be considered to correspond, although there are certain special points on which they differ. These points are wellknown; and if it is the case that, on a property devolving on a woman, the Mitákshará law at once changes the whole order of succession, surely there would have been some precedents to that effect in the law books. The rule laid down in Section 3 of the Chapter on *stri-dhun* in the Mitákshará, that the words "woman's property" are not to be used in a technical sense,

probably means that whatever estate really becomes the woman's property, so that she may act with it as she likes, may be considered *stri-dhun*, but not that any property which, at any time comes into a woman's hands, even the family property in which she is allowed only a life-interest is also *stri-dhun*. If this was the law, it would have been clearly and distinctly expressed, and there would have been no necessity for the description of the different sorts of woman's property which the law lays down.

The text of the *Viváda-chintámani* is as clear upon the subject as the text of the Mitáksharâ. There are several pages to show what special sorts of property are woman's separate property or *stri-dhun*. It is nowhere laid down that all property which a woman inherits thereby becomes *stri-dhun*, and after her death is to be inherited by her heirs. The opinion of Baboo Prosunno Coomar Tagore is, therefore, we think, not supported by the text of either the Mitáksharâ or of the *Viváda-chintámani;* and the contention of Baboo Dwarka Nath Mitter must, we think, be rejected as contrary to law and precedent.

The special appeal is dismissed with costs.—S. W. R. Vol. III, page 140.

A step-mother cannot take by inheritance from her step-son.—*Lalla Jotee Lall,* v. *Doranee Kower.*—Sutherland's Full Bench Reports for 1862-4, p. 173. *Vide* 2 Nort., p. 557. Cowel's Digest, 718.

Held that the father of a donee under a *Krishnárpan* inherits the property to the exclusion of the family of the donor.—*Kasee-ram, Kripa-ram* v. *Mt. Ichha.*—Borr. Rep. Vol. II, p. 502. (Morl. Dig. Vol. I, p. 321.)

SECTION V.

RELATIVE TO BROTHERS, THEIR SONS AND SONS' SONS.

By the Law as current in *Mithila,* a childless widow will not succeed to her husband's share of joint undivided estate if he have any brothers him surviving; they, and not the widow, succeeding to his share.—*Baboo Runjeet Singh* v. *Baboo Obhye Naraen Singh.* Sel. S. D. A. Rep. Vol. II, p. 245 (New Ed. p. 315).

See also *Mussummat Joraon Koonwur* v. *Chowdhree Dooshi Dowun Singh* and others.—*Ibid.* Vol. VII, p. 26. See *ante,* p. 231.

A Hindú dying leaving a brother and a widow, but no children, the undivided estate is inherited by the brother, and the widow is entitled to maintenance only.—*Govind-das Doollub-das* v. *Muha-lukshmee.*—Borr. Rep. Vol. I, p. 241.

The same point was decided in *Rungama* v. *Atchumma* and others.—Mad. S. D. A. Dec. Vol. I, p. 521.

Where there are two sons of a common ancestor succeeding to ancestral property, and one of those sons dies without male issue, the surviving son, and not the deceased's widow or daughter, is entitled to the succession.—*Siva-geana Pungoothy Vencata Letchoomy Nachiar* and another v. *Aundy Letchoomy Ammal* and others.—Mad. Dec. Vol. I, p. 485. (Mor. Dig. Vol. I, p. 324.)

Where a person acquires wealth either at home or abroad, by his own exertion, and dies without separating, his brother inherits the property to the exclusion of the widow and mother.—*Man Baee* v. *Krishnee Baee.*—Borr. Rep. Vol. II, p. 124.

Two brothers possessed of an undivided estate in *Mithila,* and dying leaving a widow, a daughter, and daughter's sons, the surviving brother succeeds to his share, to the exclusion of his brother's widow and issue.—*Pokh Naraen* and others v. *Mussummat Seesphool.*—Sel. S. D. A. Rep. Vol. III, p. 114.

Illegitimate sons of a *Shúdra* succeeding to their father, living and dying undivided, succeed to each other.—*Vencata-ram* v. *Ven-*

cata Luchema Ullam and another.—Stra. H. L. Vol. II, p. 304. Morl. Dig. Vol. I, p. 323.

Illegitimate brothers living in a state of union, succeed to one another.—*Mynee Boyee* v. *Ootoo-ram.*—8 Moore's I. A. p. 400, (Hughes' children's case) where the question was reviewed. It came on subsequently before the Madras High Court; (2 Mad. H. Ct. R. p. 196.) After holding that they were not barred from considering the question by the decision of the Privy Council, the Court determined that the brothers inherited to each other, and to their mother. Norton's Leading Cases, Part II, p. 568.

The whole or uterine brother has, under Hindú Law, a better claim to succession than a half-brother.—*Beer-chunder Joobraj* v. *Neel-kishen Thakoor.*—S. W. R. Vol. I, p. 177.

The half-brothers of a Hindú deceased were held to be entitled to his share of undivided property, excluding from inheritance his widow and daughters.—*Man-koonwar* v. *Bhugoo.*—Borr. Rep. Vol. II, page 139. (1 Morl. Dig. page 325).

According to the Mitákshará law a step-brother inherits after the widows if he survives them, otherwise a uterine brother's son succeeds.—*Burhum Dev Roy* v. *Punchoo Roy.*—S. W. Rep. Vol. II, page 123.

It is not optional with a minor to sue either in his own name or through the intervention of a guardian: he must be represented by a legally constituted guardian.

A member of a joint Hindú family is precluded from maintaining a suit for the specific share which would devolve upon him on partition.

Separate appropriation of profits would, in some cases, be very good evidence of a tacit agreement amongst the members of a joint Hindú family, to hold their property according to their separate shares.

A debt contracted by a father is binding upon the son, unless it is of such a nature that he can, under the provisions of the Hindú law, repudiate it.

Where two uterine brothers and a half brother are members of a joint Hindú family, and one of the two former dies, the brother

of the half-blood is not entitled to receive any thing out of the share of the deceased.—*Cheyt Narain Singh* (one of the defendants) appellants v. *Bunwaree Singh* (plaintiff) and another, respondents.—S. W. R. Vol. XXIII, p. 395.

The sons of a brother are heirs (on failure of the wife, daughter, her son, parents, or a brother) of a man dying separated without male issue.—*Pran Shunkur* and another v. *Pran Koonwur.* Borr. Rep. Vol. I, p. 427. (1 Morl. Dig. p. 324).

Two brothers living undivided and dying, one leaving a widow, and the other a widow and a son, the son succeeds to his uncle's estate, to the exclusion of his widow.—*Mussummat Goolab* v. *Mussummat Phool.*—*Ibid. p.* 154.

Under the Mitákshará a nephew succeeds not as the heir of his father, but as the direct heir of his uncle.—*Brojo Mohun Thakoor* v. *Gouree Persad Chowdhoory.*—S. W. R. Vol. XV, c. r. p. 70.

S, died leaving three sons and ancestral property, of which K, one of S's sons, took a third share. On the death of another of S's sons without issue, K's original share was increased by his deceased brother's share,—*Held* that according to the Mitákshará law, one of K's sons was entitled, during K's life-time to bring a suit to assert his right in the share of K, inherited from his deceased brother, such share being ancestral property.—*Gungoo Mull* v. *Bunsee-dhur,* 1, 6 N. W. R. p. 79.

A second cousin excludes a third.—*Maha-beer Persad* and others v. *Ram Shurn.*—Agra Rep. Vol. III, a. c. p. 6.

CALCUTTA, H. C.—*The* 15*th of August,* 1866.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

KUREEM CHUND GURAIN (plaintiff) Appellant,

versus

OODUNG GURIAN (Defendant) Respondent.

Under the Mitákshará system of Hindú Law, in default of all heirs, a brother's grandson can succeed.

Jackson, J.—The question raised in this appeal is whether, under the Mitákshará system of Hindú Law, a brother's grandson

can succeed to the estate of a deceased person. The Judge of Patna has held that he is not included among the heirs, and has on this ground dismissed his claim to inherit his granduncle's estate.

In support of this view of the law, the cases of Government *versus* Gridharee Lal Roy, page 13, Weekly Reporter, Volume IV, and of Mussummat Sona Daee *versus* Bisumbhur Sahoo, pages 168 and 169, Legal Remembrancer, Volume I, have been specially pointed out to us as following former precedents, and distinctly ruling that the enumeration of heirs as laid down in the standard authority on the Law, *viz.*, the translation of the Commentary on that Law by Sir H. Colebrooke, is an exhaustive enumeration; and it has been next pointed out that in no portion of that Law is the brother's grandson anywhere mentioned as an heir. In Chapter 2, Section 4, verse 1, brothers are mentioned; and in verse 7, brother's sons are mentioned, but brother's grandsons are not alluded to. Again, in Section 5, verse 1, it is laid down that, "if there be not brother's sons, gentiles share the estate;" and this Section goes on to enumerate *who* the gentiles are, *viz.*, first the *Sapindas*, or kindred connected by funeral oblations, such as the paternal grandmother, the paternal grandfather, the uncles and their sons, and, on failure of that line, the paternal great-grandmother, great-grandfather, his sons, and their issues inherit. And in the next verse, it is laid down that, if there be none such, the succession devolves on *Samánodakas*, or kindred connected by libations of water, and goes on to point out that *Sapindas* cease with the seventh person, while the *Samánodakas* extend to the fourteenth degree. In the next Chapter again, cognates are declared to be heirs on failure of Sapindas and Samánodakas, and those cognates are specially enumerated. Acting upon the rule that, when the particular relation is not specially enumerated as one of the heirs, he is excluded from inheritance, a sister's son was excluded in the decisions above quoted; and on the same ground, in the case of Ilias Koonwar *versus* Agund Roy (Select Reports, Sudder Dewanny Adawlut, Volume III, page 37) a brother's daughter's son was excluded.

On the other hand, it was shewn, for the appellant, that the right of a brother's grandson to succeed to an estate under the Mitákshará Law as a *sapinda* was virtually upheld both in the

Sudder Dewanny Adawlut and by the Lords of Her Majesty's Privy Council in the case of Gunga Dutt Jha, and on his death, Rutchepat Dutt Jha *versus* Rajendro Narain Roy and others, reported at page 11, Vol. II, Sudder Dewanny Adawlut Select Reports; and at pages 132 to 168, Volume II, Moore's Indian Appeals for 1839. In that case the right of a descendant in the paternal line in the sixth degree to succeed as a *sapinda* was held to be preferential to the right of a cognate. It is admitted that this case was governed by the *Mithila* Law, and it is urged for respondent that there is some distinction on this point between the *Mitákshará* and *Mithila* Laws. As respects the commentary on the Mitákshará Law, the passages above alluded to as having been quoted by the opposite side are referred to as clearly shewing that all the different heirs are not enumerated, and that there are heirs which are not there enumerated.

The learned Judge Mr. H. B. Harrington, in the course of his elaborate opinion on the Hindú Law quoted at page 156 of the decision of Her Majesty's Privy Council in the case of Gunga Dutt Jha, laid down "that the term '*puttra*' or son, in the Mitákshará, and its Commentary the *Subodhini*, is frequently used as a generic term for male issue or descendant, and must be so construed in several parts of the Mitákshará, or the grandson as well as the great-grandson would be excluded from the immediate succession, though acknowledged in every system of Hindú law to represent their father and deceased grandfather." Mr. Harrington goes on to give his reasons, alluding specially to the above quoted verses 4 and 5 of Section 5, and pointing out that the words "sons" and "issue" must mean generally lineal descendants in the male line. It may be inferred that he would have given the same interpretation to the words "brother's sons" in verse 7, Section 4; and if so, that, in his opinion, a brother's grandson could succeed to the estate of his deceased granduncle.

We are of opinion, then, that the word "sons" in the Mitákshará does, as a general rule, include all descendants in the male line who can offer funeral oblations. Otherwise it would be useless for the Mitákshará to lay down that *sapindas* descended from the sixth degree or *Samánodakas* from the fourteenth degree can succeed if it also laid down that this was confined to the sons or the grand-

sons of the great grandfather in the seventh or fourteenth degree. The words "sons" and "issue" in verse 4 and 5, Section 5, Chapter I, of the Mitáksharâ, must, we think, allude to the descendants of the paternal ancestor in the nearest degree who may be then alive up to the seventh or the fourteenth degree.

It is by no means inconsistent with this view that a brother's daughter's son has been held unable to succeed. A brother's grandson in the male line may be among the enumerated heirs under the words "brother's son," even if the daughter is thereby excluded. This decision is not, therefore, opposed to that regarding a brother's daughter's son.

We accordingly reverse the decision of the Judge of Patna, and remand the case to him for disposal of the remaining issues which arise in it.

Bayley J.:—We think that, even if the brother's grandson cannot succeed after the brother's son, still that he can succeed generally as a *sapinda* or one of the kindred who can offer funeral rites to the deceased. In this case, one brother's grandson has obtained possession of the whole estate, another sues him to obtain possession of his share of it. There is no nearer heir to the estate. The sole question is whether, under any circumstances, in default of all heirs, a brother's grandson can succeed. We think that he can.— S. W. Rep. Vol. VI, p. 158.

Brothers' sons exclude brother's grandsons.—*Gunga Deen Rawot* v. *Mudhoo Soodun.*—Agra. Rep. Vol. III, p. 11. See Norton's Leading Cases, Part II, p. 573.

According to the Hindú law, as current in Behar, the grandson of paternal uncle is excluded by a brother's son, and, on the brother's son's death, by his widow, if the family were divided; and according to the same law, a boy adopted in the *kritrima* form takes inheritance both in his own family and in that of his adopting parents.—Sel. S. D. A. Rep. Vol. III, p. 307 (New Ed. p. 410.)

Admitted legal opinions.

Half brothers share equally with whole brothers, if undivided. But are excluded by a whole brother, if separated.

Q. 1. A person had two wives; by his first wife he had two sons, and by the second one son. After the father's death, all the brothers lived together as an undivided family; and jointly possessed the paternal estate. One of the sons by the first wife died, leaving a widow, who is since dead. Subsequently to her death, the other son by the first wife, and lastly the son by the second wife, died, each leaving a widow. In this case, it is presumed the property will be made into three shares, of which two will go to the widow of the son by the first wife, and the remaining one to the widow of the son by the second wife. Is this the proper distribution according to law?

R. 1. If the original proprietor had three sons by two different wives, as mentioned in the question, and the son whose widow is dead, died while they were living together as an undivided and joint family; in this case, the uterine and half brothers should have succeeded in equal shares to the property left by their deceased brother. On their death, their widows are entitled to the succession.

Q. 2. Should it be proved, that the three brothers divided the estate among themselves, and died one after another, in this case, is there any particular rule for the widows' succession?

R. 2. Supposing the brothers to have made partition of their paternal estate, and to have taken possession of their respective shares, and subsequently one of the sons by the first wife to have died, leaving no widow, his brother of the whole blood is exclusively entitled to his share. On his death, his widow is entitled to two shares, that is to say, to the one which was her husband's original legal share, and to the other which devolved on him from his uterine brother. The widow of the son by the second wife is only entitled to the share of which her husband died seized. *March 30th*, 1820.—Macn. H. L. Vol. II, Chap. I Sect. V, Case 1.

Property derived to a woman from her husband goes at her death to his nephews; but not her peculiar property, which will go, in preference, to her step-daughter.

Q. A widow instituted an action claiming her husband's share of the ancestral estate, against his nephews, who however came to an amicable adjustment with her, having assigned some immovable property for her maintenance. From that time she continued to live with the daughter of her rival wife, which daughter had a son, since dead. On the death of the widow her funeral rites were performed by the husband of the daughter of her contemporary wife, and the first anniversary of her death was celebrated by her husband's nephews. In this case, will the property, whether it be her husband's patrimonial or her own, purchased either with the produce of her husband's patrimonial or with her own peculiar property, devolve on her husband's nephews, or on the daughter of the rival wife?

R. Supposing the childless widow to have received immovable property out of her husband's patrimonial estate by compromise from his nephews for her maintenance, she would in such property have had only a life interest. Her property, therefore, with the exception of her peculiar estate, will devolve on her husband's nephew. But the property which she purchased with her subsistence, her jewels, her perquisites, and her gains, is termed her peculiar or separate property, and should devolve on the daughter of the rival wife.—*City Patna, 4th July* 1807. Macn. H. L. Vol. II, Chapter I, Section 5, case 4.

SECTION VI.

RELATIVE TO JOINT AND UNDIVIDED PROPERTY.

It is perfectly intelligible that, upon the principle of survivorship, the right of the co-parceners in an undivided estate should override the widow's succession. According to the principles of Hindú law, there is co-parceneryship between different members of a united family, and survivorship following upon it. There is community of interest and unity of possession between all the members of the family; and upon the death of any one of them, the others may well take by survivorship that in which they had, during the deceased's life-time, a common interest and common possession. But the law of partition shows that, as to the separately acquired property of one member of a united family, the other members of that family have neither a community of interest nor unity of possession. The foundation, therefore, of a right to take such property by survivorship fails; and there are no grounds for postponing the widow's right to inherit to any superior right of the co-parceners in the undivided property.—Part of the Privy Council decision in *Katama Natchear,* v. *The Rajah of Shiva-gunga.*—*Vide* Sutherland's Privy Council Judgments, page 530; and Moore's I. A. Vol. IX, p. 611 *et seq.*

The Canon of the Hindú law of Southern India, in regard to the succession of widows, is 'that a wedded wife, being chaste, takes the whole estate of a man, who being separated from his co-heirs and not subsequently re-united with them, dies leaving no male issue.' The limit of the 'co-heirs' must be held to include undivided collateral relations, who are descendants in the male line of one who was a co-parcener with an ancestor of the last possessor. Collateral kinsmen answering the above description have interests which pass *inter se* by right of survivorship, and a widow's right as heir is excluded by the text when any of such collateral kinsmen survive her husband. The Governing principle of the rule is co-parcenary survivorship which precludes alike the right of the widow and every other member of the family, who has no right to the enjoyment of the estate before the death of the possessor.

The sound rule to lay down with respect to undivided or impartible ancestral property, is that all the members of the family who, in the way pointed out, are entitled to unity of possession and community of interest, according to the law of Partition, are co-heirs, irrespectively of their degrees of agnate relationship to each other, and that, on the death of one of them leaving a widow and no near *sapindas* in the male line, the family heritage both partible and impartible passes to the survivors or survivor, to the exclusion of the widow. But when her husband was the last survivor, the widow's position as heir relatively to his other undivided kinsmen, is similar to her position with respect to his divided or self and separately acquired property.—*Srí Rájah Yenumula Gavuri-devamma Gáru* v. *Srí Rájah Yenumula Rámandora Gáru.*—Mad. H. C. Rep. Vol. VI, p. 93.

It is not the universal rule that a Hindú woman cannot inherit so long as there is a male representative of the family. Her right to inherit depends on the nature of the property. If the property be the joint property of an undivided Hindú family, females are only entitled to maintenance; but if the property be held as a separate or divided property, it devolves upon the female heirs in their proper order of succession.—*Mussummat Soorjoon* v. *Ishru Bramma.*—N. W. Rep. Vol. III, p. 74.

The preferable right of the surviving parceners may be deduced by inference from the fact that "the same goods which appertain to one brother, belong to another likewise," and that "when the right of one ceases by his demise, those goods exclusively belong to the survivor, since his ownership is not divested." But according to both schools of Hindú law, the right of survivorship is not absolute, and the undivided share, according to both, descends to his sons.—Part of the decision in *Víra-swámi Grámini* v. *Ayya-swámi Grámini.*—Mad. H. C. R. Vol. I, p. 475.

Succession, in undivided families living under the Mitákshará goes by survivorship to the males, to the exclusion of females.—*Siva-geana Pungoothy Venkata Lechoomy Natchiar* daughter of the deceased *Satooroyer* late Zemindar of Oorcand, and *Putty Cunnoo Ammaul* widow of the deceased *Satooroyer* and guardian of the first plaintiff, v. *Aundy Letchoomy Ammaul,* her son *Goda-*

linga Satooroyer, her father *Swamy Taven*, and the deceased zemindar's brother, *Palany Comara-swamy Satooroyer*, guardians of the 2nd defendant.*—Madras Select decrees Vol. I, p. 485. Norton's Leading Cases, Part II, p. 457.

A widow is not competent to claim a share in undivided ancestral property nor can she be considered as a co-parcener of the estate; and since she is not a co-parcener, she is not vested with the same rights as the other co-parceners.—*Venkata Soobumal* v. *Vencummal*. Case 12 of 1818. 1 Mad. Dec. p. 210. (1 Morl. Dig. 317.)

A member of an undivided family living under the Mitákshará law, and having joint family property, died entitled to an undivided share in such property, leaving two widows, him surviving.

Held, that the share of the deceased did not, at his death, pass to his widows, but that (there being no male issue) it passed to the remaining members of the family by survivorship, and could not be rendered liable for the debts of the deceased in a suit against his widows.—*Sadabart Prasad* v. *Foolbas Koer*.† See *ante* p. 149.

It was held, that by the death without (male) issue of one of an undivided family during the life-time of others, his share of the undivided inheritance reverts to his father, or his direct heirs, and not his widow.—*Ambavow* v. *Rutton Krishna* and others.—Sel. Rep. page 132. (1 Morl. Dig. p. 317).

By the law as current in Benares a widow is not entitled to share an undivided estate with her late husband's brethren, and is only entitled to maintenance.—*Duljeet Singh* v. *Sheo-munookh Singh*. Sel. S. D. A. R. Vol. I, p. 59 (New Ed. p. 79.) H. Colebrooke and Harington.

By the law as current in Benares, a childless widow is not entitled to succeed to her late husband's estate, which devolved entire and without partition on him from his ancestors, to the exclusion of

* "The leading case," says Sir John Norton, "well-known as the *Oorcand Case*, illustrates the doctrine. When, then, a male co-parcener dies, the remaining male co-parceners continue to administer and enjoy the undivided property, just as though no death had happened, and this as long as they remain incorporated. 1 Stra. p. 142." Norton's Leading Cases, Part II, p. 461.

† This decision has been affirmed by the Privy Council.

his brothers.—*Rajáh Shumshere Mull* v. *Ranee Delraj Koowur.*—Sel. S. D. A. Rep. Vol. II, p. 169. (New Ed. p. 216.)

Where property is acquired by the members of a joint Hindú family from funds derived from the ancestral property and held by them in joint possession, on the death of one of them his share does not devolve on his widow.—*Mussummat Tacknoo* v. *Mussummat Moonia* and others.—S. W. R. Vol. VII, p. 440.

According to the Mitákshará law, where property is joint and undivided, a widow cannot succeed, but is entitled to maintenance only. The withdrawal by her husband's brothers of their claim to his share cannot give her a title to succeed to it.—*Monkurn Koonwur (pauper,)* v. *Thakoor Persaud.*—S. W. R. Vol. V, p. 176.

Under the Mitákshará law, a daughter can inherit a separated share, but where the property is held jointly, the widow or daughter cannot succeed, but are only entitled to maintenance.—*Kooloda Debia* v. *Rajmotee Debia.*—S. W. R. Vol. XII, p. 456.

Under the Hindú law, where property is proved to be separate and divided property, the daughters and daughter's son are the legal heirs entitled to it, and not more remote relations to the deceased.—*Burriyar Singh* and others v. *Mussummat Hunsee* and others.—Agra Rep. Vol. II, a. c. page 166.

See also *ante* pages 227, 229—232, 242, 244, 245, 400, 404, 420, 460, 466, 467, 473 and 475.

Admitted legal opinions.

According to the law of Benares, a man's daughter, the family being joint, is only entitled to maintenance from her uncles and their sons.

Q. There were four brothers of the whole blood, who jointly held a paternal landed estate. Two of them are still living, and the other two died, one leaving two sons, and the other a maiden daughter. In this case, is the daughter entitled to any share of the property, and if so, what proportion will devolve on her?

R. Supposing the maiden daughter to have no other near relation living, except her uncles and uncles' sons, then they (her uncles and uncles' sons) are bound to dispose of her in marriage. If the daughter's deceased father have not separated his portion of the paternal estate from that of his co-parceners, then they are bound to supply the necessary expenses attendant on her marriage, out of the joint estate. The daughter cannot inherit the legal share of her deceased father. This opinion is consonant to the law, as pronounced by *Yájnavalkya*, *Vishnu* and other sages.*—Zillah Alligurh, June 2nd, 1819.—MACN. H. L. Vol. II, Chap. I, Sect. iii, Case 7.

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* According to the law, as received in the school of Benares, the undivided brother's female heirs are excluded by his male co-parceners, as will appear from the subjoined extracts from the Mitákshará:—"The wife shall take the estate, regards the widow of a separated brother." page 327. "Therefore, it is a settled rule, that a wedded wife, being chaste, takes the whole estate of the man who, being separated from his co-heirs, and not subsequently re-united with them, dies leaving no male issue," page 340. But according to the law as prevalent in Bengal, the union of the family is no bar to the succession of the female heir.—Note by Sir W. Macnaghten.

of kin she succeeds." Considering the high authority of the *Muyúkha* on this side of India, this might alone seem sufficient to establish the position that the sister comes next in order of inheritance after the paternal grandmother; but, according to certain commentators on the Mitákshará, the sister comes next in order of inheritance after the brother. The passage in the Mitákshará is contained in the first paragraph of Chapter II, Section 4; 'On failure of the father, brethren share the estate.' Nanda Pundita and Balam Bhatta, says Mr. Colebrooke, in his note to this passage, consider this as including 'brothers and sisters' in the same manner in which 'parents' have been explained 'mother and father,' and conformably with an express rule of Grammar. They observe that the brother inherits first, and, in his default, the sister; this opinion, Mr. Colebrooke states, is controverted by *Kamalákara* and the author of *Muyúkha*. It certainly is so in para. 16 of Chapter IV, Section VIII, of the *Muyúkha*.

Their Lordships come to the conclusion that the general rule in Bombay has long been, and is, to treat the sisters as heirs to the brother rather than the paternal relatives of the description of the present plaintiffs. Accordingly, their Lordships think that they may safely and properly, in the present instance, adopt or accept that rule. They consider that, *in Bombay at least*, the sisters, in such a case as this, are the heirs of the brother. The consequence is that, in whatever possible manner the Will of the Testator is read, the entire interest in the property in question must, we think, be viewed as vested in the widow and her daughters, or some or one of them, and that, therefore, the appellants here, the sons of the brother of the Testator, are suing in a matter in which they have not shown the slightest interest, nor with which have they any concern. The result is, in their Lordships' opinion, that the appeal should be dismissed with costs.

It ought to be added, as to the argument that the marriage of the daughters and their marriage portions excluded them from participation, that their Lordships think there is no ground for that argument.—S. W. Rep. Vol. III, P. C. p. 41.

BOMBAY, H. C.—*The 7th of January*, 1869.

BHÁSKAR TRIMBAK ACHÁRYA, plaintiff.

MAHÁ-DEV RÁMJEE, HIRU, PUSU LAKSHUMAN, PRÁN-JIVAN-DÁS, MATHURÁ-DÁS, MUSSÁ ABDUL, NASARVÁNJI MEHERVÁNJI, and the Advocate General, Defendants.

A Hindú widow, who has inherited immovable property from her husband, though possessed of a limited power of alienating portions of such property for necessary purposes or spiritual uses, cannot dispose by a gift in *dharm* or *Krishnárpan* of the whole of such immovable property without the consent of the heirs of her husband.

Upon the death of the widow, her husband's sister is his residuary heir.

Arnould J.—The first question of law that presents itself for decision is whether Janki had a right by Hindú law to dispose by will or religious gift of the whole of her husband's immovable property in *Krishnárpan.*

The answer to this question must be, I think, in the negative. The nature of the Hindú widow's estate over immovable property inherited from her husband has been much discussed of late and must now be considered authoritatively settled by the recent decisions in the Privy Council. In the first of these in point of date, decided on the 1st of February 1867: *Mussummat Thakoor Dayee* v. *Rai Balack Ram,** the Privy Council determined that, though according to the Mitákshará a Hindú widow may dispose of movable property inherited from her husband—a power she does not possess under the law of Bengal,—yet by both laws she is restricted from alienating any immovable property *whether ancestral or self acquired* so inherited—On her death the immovable and the undisposed of movable property pass to the next heirs of her husband.

The next, I believe the last, case on the point before the Privy Council, was decided on the 14th March 1868: *Bhugwan-deen Doobey* v. *Myna Bai.*† In this case their Lordships treat it as "settled" (*i. e.,* in all the schools) beyond all question that the immovable property which a woman inherits from her husband cannot be disposed of by her, and does not pass as her *stridhan,* but passes upon her death to the next of kin of her husband. Their Lordships further held that according to the law of the Benares School the

* 10 Calc. W. Rep. p. c. 3. *Ante* p. 277. † 9 Calc. W. Rep. p. c. 25. *Ante* p. 278.

same rule applies to movable property inherited by a widow from her husband as to immovable.

It was not probably the intention of their Lordships in laying down the rule so absolutely in restriction of any alienation by the widow of immovable estate inherited from her husband to exclude her right to alienate portions of such estate for necessary purposes or for spiritual uses. All the books seem to concur in giving her such powers to a certain limited extent; but to hold that such powers extend to a gift in *dharm* or *Krishnárpan*, as in this case, whether by will or by religious ceremony, of the *whole* or *all* but the whole of the immovable property inherited by a widow from her husband would be a position inconsistent both with the letter and spirit of the recent decisions which have defined the limits and the nature of the Hindú widow's estate.

On these grounds neither Janki's *dharm* writing nor her Will nor her religious gift in *krishnárpan* could in my opinion be supported, if they stood alone, as binding upon the heir or heirs of her husband, and the only question therefore is whether the heir or heirs of her husband has or have not so far adopted, ratified, and acted upon them as to have estopped himself or themselves from now contesting their validity.

This leads to the inquiry, who at Janki's death was the heir or who were the heirs of Vithal Pilaji. That the death of the widow is the true point of time to fix on in order to ascertain who are to take as heirs of the deceased husband must now be regarded as a clearly established rule. "It is settled," says Sir Barnes Peacock in deliverying the judgment of a full Bench Court at Calcutta, "that the widow does take as heir to her husband in default of issue, and that upon her death those persons succeed as reversionary heirs who would have been the heirs of her husband if he had died at that time."*

Now, from the statement already made as to the members of Vithal's family alive at Janki's death, it clearly results that at that point of time the heir and the only heir of Vithal Pilaji was his sister, Lakshmi; Pusu Lakshuman, as son of a sister of Vithal Pilaji, who had died before his widow, had, according to the law

* 9 Calc. W. Rep. c. r. p. 508.

prevailing at this side of India, no claim in my opinion as against Lakshmi the surviving sister to be reversionary heir of Vithal Pilaji on Janki's death. It has recently been held by the Privy Council that according to the Mitákshará law (which, speaking generally, regulates us here) a sister's son cannot inherit, *Thakoorain Sahiba* v. *Mohun-lall.**

The Full Bench in Calcutta, in a still more recent decision have held that the Privy Council in the above case only decided that a sister's son could not inherit as a *sapinda* or heir of the first class, and they further held that a sister's son under the Mitákshará law may inherit as a *bandhu* (*i. e.*, as a kinsman sprung from a separate family but allied by funeral oblations:) *Omrit Koomaree Dabee* v. *Luckhee Narian Chuckerbutty.*† Even assuming this decision to be well founded, still Pusu, as sister's son to Vithal Pilaji and claiming as a *bandhu*, could only come in after Lakshmi, his (Vithal Pilaji's,) surviving sister who took as a *sapinda*, nor would he have any claim till the failure of Lakshmi's nearer heirs.

Lakshmi, therefore, having been entitled on the death of Janki to succeed as sole reversionary heiress to the property of Vithal Pilaji, the next question is what was the *quantum* and nature of the estate she so took.

The answer is that Lakshmi taking as sister took absolutely.

This appears clear from the decision of the late Supreme Court of Bombay in *Venayak Anand-rao* v. *Lakshmi-bai*‡ which was confirmed on appeal by the Privy Council.§ It is there distinctly laid down that sisters, like daughters, take absolutely.

The next question is, what was the course of the descent of the estate that Lakshmi thus took absolutely (*i. e.*,) supposing her not to have disposed of it, as she might in her life-time, to whom would it go on her death. My view is that Lakshmi, taking the property as heir to her brother Vithal, would take it as *woman's property*; and that the course of descent from Lakshmi would be first in the female line, the male line not being resorted to till the female was exhausted. It appears to me that the well-known text in the Section of the Mitákshará which treats of woman's property‖

* 7 Calc. W. Rep. p. c. 25.
† 10 Calc. W. Rept. F. B. p. 76.
‡ 1 Bom. H. C. Rep. 117. *Ante*, p. 486.
§ 9 Moo. Ind. App. p. 532. *Ante*, p. 486.
‖ Mitak. Ch. II, Sec. 11, para. 2.

must be regarded as law on this side of India, except so far as regards the widow's estate in property inherited from her husband, which estate has been taken out of the text of the Mitákshará on the strength of other texts inconsistent with it—such especially as that of *Katyáyana* cited by the Privy Council in the decision already adverted to as the latest in date on the subject of widows' estate.* "The childless widow, &c., may frugally enjoy the estate or property of her late husband until she die; after her death the legal heirs shall take it."

It has been, as already intimated, conclusively decided by the Privy Council that immovable property (and on the other side of India movable estate also) so inherited by a Hindú widow from her husband is not woman's property or *strídhan.* To this extent (namely to the extent of the widow's estate) an exception has been introduced into the text of the Mitáksharé by an authority binding on all Courts in India.

It seems to me on the best opinion I can form on the matter that Lakshmi taking by inheritance from her brother would take his estate as woman's property.

Lakshmi, then, according to my view, was, on Janki's death, sole residuary heir of her brother Vithal Pilaji, and Hiru on Lakshmi's death became the heir of Lakshmi.—Bombay H. C. Vol. VI, o. c. j., pp. 1—19.

Where a Hindú died, leaving property which had descended to him from his maternal grandfather, it was held that his sister and her sons succeeded to such property, in preference to his paternal aunt. *Laroo* v. *Sheo* and others.—Borr. Rep. Vol. I, p. 71. (1 Morl., Dig. page 325.)

A Hindú dying and leaving three sisters two of whom died, each leaving a son and daughters, the surviving sister is heir to her brother: however, should she of her own free will resign her right to the property, the sons of the other two sisters will succeed each to a half part of it, as their own sisters again have no right to share.—*Ichha-ram Shumbhoo-das* v. *Purmanund Baichund.*—Borr. Rep. Vol. II, p. 471. (1 Morl. Dig. 325.)

* 9 Cal. W. Rep. P. C. pp. 23 and 30.

SECTION VIII.

RELATIVE TO GENTILES.

PRIVY COUNCIL,*—*The 28th of June* 1870.

BHYA RAM SINGH and BHYA JUBRAJ, (Defendants)
versus
UGAR SINGH and others, (Plaintiffs.)

On Appeal from the Sudder Dewanny Adawlut, North-Western Provinces.

According to the Mitákshará, the great-great-great grandson of the great-great-great grandfather of the deceased is entitled to succession as one of the gentiles.

Their Lordships took time to consider, and on 28th June 1870, Sir R. Phillimore delivered the following written judgment:—

The suit out of which this appeal arose was brought in the Court of the Principal Sudder Ameen of Goruckpore, by the plaintiffs, as heirs, after the death of his widow who survived him, of one Jaskaran Sing, to recover certain movable and immovable estate the property of the deceased at his death. It appeared that the plaintiffs claimed as kindred of the deceased, connected with him by descent from their common ancestor, Chatter-patti Sing.

By the pedigree it appeared that the plaintiffs and the deceased were in an equal degree removed from the common ancestor, being his great-great-great grandsons. The appellants contended that the plaintiffs were too remote in descent from the common ancestor to be capable of succeeding to the deceased.

At the widow's death the heirs of the husband, at that time alive, were the legal heirs. The property claimed was at that time in the possession of the defendants, under alleged alienations by the widow.

The defendants denied the plaintiffs' title. They contended by their answer that the plaintiffs were not within the line of heirs.

The question, then, is reduced to this, whether the plaintiffs,

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* *Present:*—The Right Hon'ble Sir James Colville, Sir R. Phillimore, Lord Justice Gifford, and Sir Lawrence Peel.

being great-great-great grandsons of the common ancestor, were too remote in degree to be heritable as gentiles.

The Mitákshará, in the 5th and 6th Sections of the 2nd Chapter, recognizes two successive classes of heirs: first, 'gentiles;' next '*bandhus;*' after them it places certain special persons, and after these last the State, the *ultimus hæres.*

Whatever descent prevails, and even where the State takes by escheat, the duty of some ceremonial performance to the deceased is still enjoined.

The gentiles, or *gotraja,* from the *gotra,* are described as descending from one common stock, a male, as forming a family, though embracing, possibly, many families.

The law of succession amongst gentiles classifies them further, as *sapindas* and *Samánodakas*; the first it treats as prior to the second. As the plaintiffs then in this case show a common ancestor, a *gotra,* a community of family, and a descent which extended to the deceased and themselves, they appear to satisfy every condition of the text, and as the decision appealed from proceeds upon the above grounds, and strictly conforms to the language of the Mitákshará, it follows that it must be affirmed, unless it can be shown, that the plain language of the Mitákshará has received some qualification by usage or judicial construction.

Where all the contending kindred are in an equal degree remote, and where the benefits conferred are equal, though slight, the principle of selection founded on superior efficacy is inapplicable to the solution of that question of precedence.

The Sudder Court supported its opinion by the authority of two cases decided in the Privy Council. The case of *Rany Sreemutty Debeah* v. *Ranee Koond Luta**. In the case of *Rutcheputty Dutt Jha* v. *Rajendernarain Rai*†, the very passages of the Mitákshará and that from *Menu,* which has been relied on in this case, and in the Court of appeal in India, referring to the "seventh person," and the limits of the line of *sapindas,* received an authoritative exposition. That case, it is true, was one to which the doctrine of the Mithila school was applicable, but the interpretation of the text was unaffected by that distinction.

* 4 Moore's I. A., 292. † 2 Moore's I. A., 132.

If this last case be attentively considered, and the learned and elaborate opinion of Mr. Harrington be carefully studied*, it will clearly appear that the preponderance of the opinions of the various Pundits then consulted was greatly on the side of the literal construction of the Mitákshará. The judgment of the Privy council concludes, that the *bandhus* do not inherit "till those on the father's side to the seventh degree have been exhausted." As the judgment is founded in a great degree on that of Mr. Harrington, and expresses no dissent from his method of arriving at the seventh person, by taking six degrees in the descending or ascending line, the Sudder Court was justified in treating this point as settled by authority, and the plaintiffs as gentiles within the degrees, and so entitled to inherit. The Pundits may be taken as fair exponents of the views of the Hindu people on such subjects, and as the great majority of them supported the inclusive construction which ranks the descendants to the sixth degree amongst the class of *sapindas*, there is no reason for supposing that the plain construction of the language of the text of *Menu*, and of its authoritative comment, will clash with the religious feeling of Hindús.

Their Lordships are of opinion that the decision appealed from, on the materials before the Court on the issues in bar was correct, and they will humbly advise Her Majesty that the appeal be dismissed with costs.—B. L. Rep. Vol. V, pp. 293—305.

By the Mitákshará, a male descendant in the fifth degree from great-grandfather of the *prœpositus* succeeds to the exclusion of the sister's son.

A Hindú widow executed deeds of gift, in which her late husband's mother, the nearest reversioner, concurred. After the death

* Mr. T. H. Harrington, whose decision, concurred in by 'his colleagues,' was affirmed by Her Majesty's Privy Council, after stating that the term *putra*, or son, in the Mitákshará, and its commentary, the *Subhadini*, is frequently used as a general term for male issue or descendants, he goes on to observe, (2 Moore's I. A. 132, 157, 158.) "To adopt the construction proposed by the appellant would be to cut off all the descendants below the grandson of the father, grandfather, and every other ancestor, and would render nugatory the provisions in the Mitákshará as well as in the other books of law, which expressly state—'The succession of kindred belonging to the same family, and connected by funeral oblations to the seventh degree; or if there be none such, the succession devolves on kindred connected by libations of water, and they must be understood to reach seven degrees beyond the kindred connected by funeral oblations of food, or else as far as the limits of knowledge as to birth and name extend.'" (Mitákshará, Chapter II, Section 5, Paras 5, 6.)

of the widow, but in the life-time of the mother, the next presumable reversioner sued to set aside the deeds and for possession.

Held, that the suit was good so far as it sought to set aside the deeds; that the mother having died before decree, no objection could be taken on the ground that the decree gave possession to the plaintiff.

Such suit was held to be no bar to a second suit by the same plaintiff to set aside a mortgage by the widow and the mother of the deceased of a portion of the property which was the subject of the first suit, although in that suit the property was described as subject to the mortgages, and the name of the mortgagee was mentioned. The true test of Section 7 of Act VIII of 1859 is whether there has been a splitting of the cause of actions.

The burthen of proving the necessity for a mortgage by a widow rests on the mortgagee where the necessity is disputed by the next heir.—*Kooer Golab Singh* and others v. *Rao Kurim Singh.*—Privy Council, the 12th of July 1871.—B. L. Rep. vol. VI, pp. 1, 2 and 7—15.

A second cousin excludes a third.—*Muha-beer Pursaud* v. *Ram Surn.*—3 Agra Rep. a. c. p. 6.

According to the law as current in *Mithila,* claimants to inheritance as far as the seventh, and even the fourteenth in descent in the male line from a common ancestor, are preferable to the cousin by the mother's side of the deceased proprietor.—*Gunga-dutt Jha* v. *Sree-narain Rai and another.*—Sel. S. D. A. Rep. Vol. II, p. 11. (New Ed. p. 13). This decision is given in *extenso* in the Chapter on Emigration.

The right of succession to the estate in question, decided in favor of a party who established his affinity to the late proprietor in the sixth degree; judgment founded upon the law current in *Mithila,* by which the claim of paternal kindred who are *Sapindas* which relation includes the descendants of the paternal ancestor in the sixth degree, are preferable to those of maternal kindred, cognates.—*Chowtreeah Run-murdun Sein* v. *Sahib Perlhad Sein* and others.—Sel. S. D. A. Rep. vol. VII, p. 292 (New Ed. p. 348). See *ante,* p. 199, wherein will be found the Decision of the Privy Council in the above cause.

By the law in force in *Mithila*, the right of succession vests in the descendants in the paternal line in preference to those in the maternal line, and such line being held to continue to regulate the succession to property in a family who had migrated from that district, but had retained the religious observances and ceremonies of *Mithila*, it was held that descendants in the paternal line in the sixth degree are preferable to one claiming as the cousin on the mother's side.—*Rutcheputty Jha* and others v. *Rajender Naraen Roy* and another.—Moor. Ind. App. vol. II, p. 132. (1 Morl. Dig. page 329).

The great grandsons of the paternal uncle of a deceased Hindú were held to be entitled to his immovable property, to the exclusion of his great nephews by the mother's side.—*Mussummat Umroot* v. *Kulyan-das*, Borr. Rep. vol. I, p. 284 (1 Morl. Dig. p. 329). Nort. II, 574.

In a case of disputed adoption, where the son of the alleged adopted son had held possession of the estate until his death, leaving a childless widow, who also died, the adoption being considered by the Court to be unsubstantiated, it was decreed that the estate should go to the descendants of the brothers of the father of the alleged adoptive grandfather, the intermediate heirs having failed, to the exclusion of the sons of his daughters.—*Baboo Girwurdharee Singh* v. *Kolahul Singh* and others; and *Keerut Singh* v. *Baboo Girwurdharee Singh*, Sel. S. D. A. Rep. Vol. IV, p. 9. (Morl. Dig. Vol. I, p. 328.)

Where A. and B. the son's sons of the great grandfather of C, claimed the estate of C, at his decease, against D, the widow of the elder brother of C, his sisters and their sons; it was held, that, according to the law as current in *Mithila*, A and B were entitled to the inheritance.—*Ranee Pudmavatee* v. *Baboo Doolar Singh* and others.—Sutherland's Privy Council Judgments, p. 178. See Morl. Dig. vol. I, p. 330.

"*Sámánodakas*" (or persons allied by a common oblation of water) belonging to the "*gotra*" (or race of general family) of a deceased person are, according to Hindú law, sufficiently cognate

to succeed to property in default of parties nearer of kin.—*Nursing Narain* v. *Bhuttun Lall*.—S. W. R., for 1864, p. 194.

Under the Mitákshará law, if there be no kindred to the same general family, and connected by funeral oblations, the successions devolve, on kindred connected by libations of water, gentiles must be exhausted before the cognates can succeed. *Mussummat Dig Dye* and others v. *Bhuttun Lall* and others.—S. W. Rep. Vol. XI, page 500.

Under the Mitákshará law, a brother's grandson may be an heir. *Mussummat Oorhya Kooer* v. *Rajoo Nye Soobool*.—S. W. R. Vol. XIV, p. 208.

CALCUTTA H. C.—*The* 12*th of July* 1870.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble L. S. Jackson and F. A. Glover, *Judges*.

THAKOOR JEEB-NATH SINGH (Plaintiff,) Appellant,

versus

THE COURT OF WARDS and others (Defendants,) Respondents.

Section 5, Chapter II, of the Mitákshará was not intended to be an exhaustive enumeration of the *gotrajas* (gentiles), but only a statement of the order in which they would inherit, and does not, therefore, limit the inheritance to the grandsons of the paternal grandfather and paternal great-grandfather.

Couch, C. J.—This is an appeal from the decision of the Deputy Commissioner of Lohardugga dismissing the plaintiff's suit with costs. The suit was brought to obtain possession of the Ramghur estate as heir to Triloke-nath Singh, deceased. The plaintiff is the son of the sister of Triloke-nath's father, and the defendant Brum Narain is the great-grandson of the great-grandfather of the grandfather of Triloke-nath; and the main question which has been raised in this appeal is whether the plaintiff is, under the law contained in the Mitákshará, the heir to the deceased Triloke-nath in preference to Brum Narain, it being assumed that by the custom

of the family, the defendant Maha-ranee Heera-nath Koomaree, the mother of the deceased, is incapable of inheriting. The argument for the plaintiff has been rested upon the interpretation which, it is contended, should be put on the 5th section of the 2nd chapter of the Mitáksharâ, and it is said that in that section the author refers to the text in Section 1, Verse 2, and enumerates the heirs; and that only those are gentiles *(gotrajas)* who came within the scheme of Section 5, by which it is said the collateral succession is limited to the grandson of the common ancestor, the degrees being reckoned in the direct line, and on failure of these the cognates succeed. Thus ***Brum Narain***, who is a great-grandson of the common ancestor, would be excluded, and the plaintiff, who is the nearest cognate, entitled to the inheritance.

Before noticing the decided cases upon the point, we think we had better consider the text of the Mitáksharâ.

In Chapter 2, Section 1, Verse 2, the rule of *Yájnavalkya* is given:—"The wife, and the daughters also, both parents, brothers likewise, and their sons, gentiles, cognates, a pupil, and fellow-student; on failure of the first among these, the next in order is indeed heir to the estate of one who departed for heaven leaving no male issue. This rule extends to all persons and classes."

In Section 5, the author, having in the previous Sections commented on the right of the wife, the daughter, and the daughter's sons, the parents, and the brothers, proceeds to comment on the succession of the *gotrajas* or gentiles. In the first place, the paternal grandmother takes the inheritance, and on failure of her the paternal grandfather, the uncles and their sons—Section 4.

"On failure of the paternal grandfather's line, the paternal great-grandmother, the great-grandfather, his sons and their issue, inherit"—section 5.

It is urged that the author thus limits the inheritance to the grandsons of the paternal grandfather and paternal great-grandfather, and that the words which follow—"In this manner up to the seventh degree must be understood the succession of kindred belonging to the same general family"—apply the same rule to the descendants of remoter ancestors. If this be the interpretation, the author of the Mitáksharâ does not expound the text of *Yájnavalkya* by stating the order in which the *gotrajas* or gentiles are to succeed, but he

makes a different rule of succession by which some of them are altogether excluded from the inheritance, the text of *Yájnavalkya* being that on failure of the gentiles, the cognates (the next in order) are to succeed. It is reasonable to suppose the author intended to state the order of succession among *gotrajas* rather than to introduce a different rule. And it has been suggested in the argument for the respondent, that the making the enumeration in the collateral line cease at the grandsons is explained by the offering of funeral oblations. It is argued for the respondent that, as the *Sapindas* are of two grades, the nearer who offer and partake of *pinda* (the rice ball) entire, and the remoter who offer and partake of merely the wipings of the hands, the author keeping in mind the text he had before cited in Section 3, verse 3, and Section 4, verse 5, "To the nearest *Sapinda* the inheritance next belongs," enumerates the *Sapindas* in the order of propinquity, omitting the great-grandsons of the father, of the paternal grandfather, and of the paternal great-grandfather, because they are remoter than the kindred he mentions. And the passage in *Su-bodhini* translated in the note at page 144, West and Bühler, is consistent with this. It is, "on failure of the father's line, the line of the father (must be understood to) end with the brothers and their sons," which may mean for the purpose of determining who are the nearest *Sapindas*. It cannot be supposed that it was intended entirely to exclude the father's great-grandson, and that the inheritance should go to another family.

That the 5th Section was not intended to be an exhaustive enumeration of the *gotrajas*, but only a statement of the order in which they would take, seems to be the interpretation which is consistent with the text which was being expounded, and with the ruling principle of the Hindu Law of inheritance, and ought to be preferred. But the question is really settled by decisions. In *Rutcheputty Dutt Jhá* versus *Rajender Narain Roy*, II, Moore's Indian Appeals, 132, it was held that by the Hindoo Law in force in Mithilá, the party in possession being descended in the sixth degree in the paternal line was to be preferred to the maternal line. At the close of the judgment, it is said that the Mithilá law was against the claim of any relation on the mother's side, till those on the father's side to the seventh degree have been exhausted. Some of the authorities quoted in that case—the *Viváda Chintámani* and *Vivúda*

Chandra for instance—do not belong to the Benares School, by the law of which the case before us is governed; but this is not a point upon which there appears to have been a difference between the Mithila and Benares Schools. In Mussummat Dig Daye *versus* Bhuttun Lall, XI Weekly Reporter, 500,* it was held by Mr. Justice L. S. Jackson and Mr. Justice Mitter that gentiles must be exhausted before the cognates can succeed. There are several decisions in the North Western Provinces upon the law according to the Benares School. In Duroo Singh *versus* Rai Singh, S. D. A. Reports, 1864, page 521, it was held that though the great-grand-sons of the paternal great-grand-father of the last male owners are not expressly enumerated by Sir W. Macnaghten as heirs according to the law as current in Benares, yet they are entitled to inherit.

In Ugur Singh *versus* Ram Singh, S. D. A. Reports, N. W. P., July 1865, page 4, it was also held that in the tracts governed by the Benares Law, a great-grand-son is included among near heirs, and several previous decisions to the same effect are quoted at page 11. In that case both the claimants and the deceased appear to have been in the fifth degree from the common ancestor. There is another decision in the same Court, Shoodhyan *versus* Mohun Pandey, II Sudder Dewany Adawlut Reports, N. W. P., 1863, page 134.

In the Bombay Presidency the same construction has been put on the Mitákshará, and the series has been considered by the *Shástrís* as not exhaustive, nor intended to exclude others than those named, but only as an exemplification of the general doctrine; Digest of Hindú Law by West and Bühler. Book I, page 139. It was also recognized as the law of the Mitákshará in Ranee Sreemutty Debia *versus* Ranee Koond Luta, 4 Moore's Indian Appeals, page 292.†

We are, therefore, clearly of opinion that the appellant is not entitled to the inheritance in preference to the respondent Brum Narain, and that the decision of the Lower Court on this point is right. As regards that part of the case which is described in the plaint and is called in the grounds of appeal the constitution of an heir by appointment, we need only say that, taking the evidence of Maha-ranee Prem Koomaree to be entirely true, there was no adop-

* Ante, p. 498.

† 7 W. R., P. C., p. 44.

tion nor any thing which would by Hindú Law alter the status of the plaintiff, and give him any other right of succession than he had as the father's sister's son. The question between the Maharanee and the defendant Brum Narain is the subject of another suit. As between the plaintiff and Brum Narain, the decision of the Lower Court is right, and the appeal must be dismissed with costs as against the second and third respondent, but without costs as against the first respondent, the Court of Wards.—S. W. R. Vol. XIV. p. 17.

SECTION IX.

RELATIVE TO BANDHUS OR COGNATES.

Under the Mitâksharâ law, if there be no kindred of the same general family, and connected by funeral oblations, the successions devolve on kindred connected by libation of water. Gentiles must be exhausted before cognates can succeed.—*Mussummat Dig Dayee* and others v. *Bhuttun Lal* and others.—S. W. R. Vol XI, page 500.

Suit for the landed estate of a deceased Hindû situated in Bengal, by the son of his sister against the son of his paternal uncle. By the law of Bengal, the plaintiff would be heir: by the law of *Mithila*, the defendant.*—*Raj-Chunder Narain Chowdhry* v. *Gokul-Chund Goh.*†—Sel. S. D. A. R. Vol. I, p. 43 (New Ed. p. 56).

A sister's son, except in Bengal, is no heir according to the Mitâksharâ or *Mithila* School.‡—*Jowahir Rahoot Mussummat Kailassoo.*†—S. W. R. Vol. I, p. 74.

According to the Hindu law in force in the Madras Presidency, a sister's son does not inherit. *Doe Dem, Kullammal* v. *Kuppu Pillai.*—Mad. H. Rep. Vol. 1, p. 85. This case affirmed the law as laid in *Talyil Manain Marrain Terromemboo* v. *Nalapora Paul Babachy*, Mad. S. R. for 1858, p. 209, 211, and *Naga-linga Pillai* v. *Vadi-linga Pillai. Ibid.* for 1865, p. 245. Norton's Leading cases, part II, p. 536.

According to the *Benares* School of Hindû Law prevailing in the *Mithila* country, a sister's son, in the absence of lineal heirs, has no title to succeed as heir to his deceased uncle's ancestral estate.†

Suit by a sister's son against his uncle's widow to set aside an adoption made by the widow to her deceased husband. Held, re-

* The Hindu law, according to the doctrine of Bengal, is correctly stated, being exactly conformable to *Jîmûta Vahâna*, Chap. XI, Sect. 6, § 8. The books of greatest authority in *Mithila*, on the subject of inheritance, are silent in regard to the sister's son; and the established opinion is that a male descendant of the remoter ancestor shall inherit, and not a descendant through females of a near ancestor.—Part of the Note, appended to the above case, by Mr. H. Colebrooke.

† But see post, p. 505.

versing the decree of the Sudder Dewanny Adawlut at Agra, that as sister's son, he had no *locus standi* to sue as reversionary heir for his deceased uncle's estate, or to challenge the widow's adoption.—*Thakoorain Sahiba* and *Chowdry Jai Chund* appellants and *Mohun Lall* and others Respondents.*—Privy Council, the 4th of March 1867. Moore's Indian Appeals, Vol. XI, p. 386.

AGRA SUDDER DEWANNY ADAWLUT.

MUSSUMMAT MOONEEA AND MITHOO Appellants,
versus
DHURM Respondent.

In this case the Court's judgment was in the following terms:—We are aware that there is a ruling of this Court in the case of *Thakoorain Sahiba* and *Chowdry Jai Chund* v. *Mohun Lall*, dated 18th of April 1863, which declares that a sister's son may inherit his maternal uncle's property, but this decision only accepts him as an heir in the absence of any lineal male descendant of the fourteenth degree, or distant kindred. We, however, observe that the weight of precedent and opinion is against this ruling. Macnaghten, (Vol. II, p. 87) does not admit of such a claim; nor Strange (Vol. I, p. 147). We do not find a sister's son in the table of succession in the Mitákshará. The sister's son appears to be regarded as sprung from, and belonging to, a different family. In the Madras Presidency

* Part of the body of the decision of which the above is the abstract is as follows:—"Of what may be called the modern authorities, we have, first, the decision of the Sudder Dewanny Adawlut at Calcutta in 1801. *Raj Chunder Narain Chowdhry* v. *Gocul Chund Goh* (1 Beng. Sud. Dew. Awd. Rep. 43 *Ante*, 503). It is impossible to read that case without seeing that the point was clearly raised before the Court, which at that time consisted of Judges, who were considerable authorities on Hindú law. That decision has received the high sanction of Sir *William Macnaghten*, "Hindu Law," Vol. I, p. 28; it is also cited by Sir *Thomas Strange*, "Hindu Law," Vol. I p. 147, and it has ever since been considered to be a correct exposition of the Law. At page 84 of the second volume of *Macnaghten's* Principles and Precedents "of Hindu Law," we have the *Bywusta* or opinion of the Pundit of the *Dacca* Court of Appeal purporting to interpret the text of *Yájnavalkya*. He there puts sisters' sons out of the category in which Mr. Piffard would include them; although erroneously perhaps, he puts them among the *Bundhús*, or distant kindred. Again from M. S. case cited at the Bar we find that the *Agra* Court overruling its decision in this case, has recently held that the sister's son is not in the line of heirs at all; that the same point has been decided at *Madras*, and was recently decided in the High Court of *Bengal*. Against all these concurrent authorities we have nothing to set but the decision now under review, which it is admitted at the Bar cannot rest upon the ground on which the judges put it.—Moore's I. A. Vol. XI, pp. 403, 404. See, however, the two cases next following.

he would not inherit, (Mad. Sud. Dew. Ad. 1859, p. 249.) We are further confirmed in our opinion on this case by a decision of the High Court, dated the 6th September 1864, (Morgan and Shumbhoo Nath Pundit, Judges) which rules that a sister's son is no heir where the Mitákshará (the authority in Benares) prevails. We, therefore, consider the plaintiff has no *locus standi* in Court, and that his suit should have been dismissed on that account. With this view of the case we decree the appeal and reverse the decision of the Lower Court, with costs.—*Vide* Moore's Indian Appeals Vol. XI, p. 393.

CALCUTTA H. C. A.—*The* 12*th of September* 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble L. S. Jackson, J. B. Phear, A. G. Macpherson and Dwarka Nauth Mitter, *Judges.*

OMRIT KOOMAREE DABEE (Plaintiff) Appellant,

versus

LUCKHEE NARAIN CHUCKERBUTTY (Defendant) Respondent.

In the absence of nearer relatives a man may be heir to his mother's brother as regards property subject to the Mitákshará.

This case was referred to the Full Bench by Bayley and Phear, J. J., under the following remarks:—

Phear, J.—The material facts of this case appear to me to be as follows:—

The land which forms the subject of the suit was formerly the property of one Rughoo-nath, on whose death without leaving male issue, it came into the possession and enjoyment of his widow. When the widow died, Rughoo-nath's daughter Koochil-monee succeeded to the property, and at her death, it passed into the possession of her husband's nephew named Suroop.

While the property was thus in the possession of Suroop, one Luckhee-narain, the holder of a bond from Koochil-monee, brought a suit upon it against Suroop as Koochil-monee's representative. The plaint was filed on the 30th of April 1867, and Luckhee-narain

obtained a decree on the 27th of November of the same year. In execution of this decree the property in question was sold. It was bought by Luckhee-narain himself; and in virtue of this purchase he has obtained possession of it.

The present suit was instituted on the 21st of April 1864 by one Nundo-lall, seeking to obtain possession of the property for himself on a little superior to that of Luckhee-narain, Suroop, and all others who claim through Koochil-monee. Nundo-lall, who has died since the filing of the plaint, was the son of Rughoo-nath's sister, and in that character he contended in this suit, that on the death of Koochil-monee he was the heir of Rughoo-nath, and entitled to take his immovable property.

The first issue between the parties was, whether or not Nundo-lall as sister's son could by law inherit from Rughoo-nath.

The Lower Appellate Court finding as a fact that plaintiff's family came from the *Mithilá* provinces, and had always adhered to religious rites and customs of those provinces, held that the plaintiff was bound by Mitákshará law. The Lower Appellate Court, following the then construction of the Mitákshará law given by Macnaghten (Hindú Law, Vol. I, p. 28), determined that plaintiff, as sister's son, was excluded from the inheritance, and, accordingly, it dismissed his suit.

Against this decision, the plaintiff appeals, especially on grounds; 1st, that the Court ought to have applied the *Mithilá* law to the case, instead of the Mitákshará law, and that by the *Mithilá* law the plaintiff was entitled to succeed; 2nd, that even by the Mitákshará law, if properly interpreted, the sister's son was not excluded from the inheritance.

As to the first objection, it seems to me that the Lower Appellate Court would have been wrong if it had applied the *Mithilá* law to the case. Rughoo-nath, as I understand, was domiciled, and the property itself was situated, in a district where the Mitákshará law prevails. Consequently, as nothing appears in the whole case to suggest that Rughoo-nath was subject to any other proprietary law, it follows that the Mitákshará law was the law according to which the matter of inheritance was to be determined.

As to the second ground of appeal, the inclination of my own opinion is, that according to the Mitákshará the sister's son is heir

in default of nearer of kin. The current of judicial decisions, however, runs so strongly against this construction that I should not alone have considered myself justified at this date in resisting it. But as Mr. Justice Bayley desires to refer the case to a Full Bench, I am willing to concur in doing so, and think the question should be simply, whether under the Mitákshará law a sister's son can, in any case, be heir to his mother's brother as regards immovable property?

The judgments of the Full Bench were delivered as follows:—

Mitter J.—The question we have to determine in this case is whether, according to the Hindú law as current in the Benares school, a sister's son is entitled to inherit as a *Bandhu* or cognate. Before proceeding, however, to determine the question, we must answer a preliminary objection that has been raised before us by the pleader for the respondent. It has been contended, that the point under our consideration has been already set at rest by a decision of the Privy Council.* We are of opinion that this contention cannot be maintained. True it is, that the decision of the late Sudder Court at Agra, which was reversed by the Lords of the Judicial Committee, was based upon the ground, that the sister's son is entitled to inherit as a *Bandhu,* but this position appears to have been abandoned before their Lordships by the learned counsel who conducted the case on his behalf. The result of this concession was, as their Lordships have themselves observed, to reduce the whole matter in controversy to the simple question as to whether, upon the proper construction of the Mitákshará, the sister's son is not entitled to come in among the earlier class of heirs or *Sapindas?* This was, in fact, the only question that was discussed before their Lordships, and the only one upon which they have pronounced a judicial opinion. To remove all doubts on this point, the following passage, in their Lordships' judgment, might be conveniently referred to: "He there put the sister's sons out of the category in which Mr. Piffard would place them, though erroneously, perhaps, he has put them among the *Bandhus.*" The word "perhaps," in the above sentence, is sufficient to show that their Lordships did not intend to decide the point that we have now got before us, and the preliminary objection is, accordingly, over-ruled.

* Reported in page 681 of Sutherland's Privy Council judgments.

With reference to the main question itself, we are of opinion that the sister's son is entitled to rank as a Bandhu according to the definition of that term as given in the Mitákshará itself. The definition is contained in the following passage :—

"On failure of the paternal grand-mother, the *(gotraja)* kinsmen sprung from the same family with the deceased, and allied by funeral oblations, namely, the paternal grand-father and the rest, inherit the estate. For kinsmen sprung from a different family, but allied by funeral oblations, are indicated by the term cognate ('bandhus')."*

It will be observed, that two conditions are necessary to meet the requirements of this definition: namely, first, that the claimant should be a kinsman sprung from a different family; and, second, that he should be connected by funeral oblations. Both these conditions are strictly fulfilled in the case of the sister's son, and, as we will show further on, in a much higher degree in his case than in that of any of the nine individuals whose claims to succeed as Bandhus are admitted on all sides. That he is a kinsman sprung from a different family is unquestionable, and it is equally clear that he is a *Sapinda,* or one allied by funeral oblations. It has been argued, that according to *Manu,* a Hindu is required to perform the funeral obsequies of his paternal ancestors only; that in consequence of this rule, the *sagotras,* or those who belong to the same *gotra* or family, are the only persons entitled to be recognised as *Sapindas;* and that the sister's son must be, accordingly, excluded from that category. We are of opinion that there is no authority whatever to support this contention. We have, however, the express authority of *Manu* himself to decide this point, and what is of still greater importance, for the purposes of the present discussion, it is an authority quoted and acted upon by the author of the Mitákshará.

"For with regard to the funeral obsequies of ancestors, daughter's sons are regarded as son's sons. *Manu* likewise declares :— 'By that male child whom a daughter, whether appointed or not, shall produce by a husband of equal class, the maternal grandfather becomes the grandsire of son's sons. Let that child give the oblation and take the inheritance.'"

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* Colebrooke's Mitákshará, Verse 3, Sect. 5, Chap. 2, p. 350.

It is manifest from the above that the maternal ancestors also are entitled to receive funeral oblations, and this proposition strikes at the very root of the contention that has been raised before us. Now, the sister's son is no other relative than the daughter's son of the father; and if it be once conceded, as it must be, that the daughter's son is a *Sapinda*, it would follow, as a matter of course, that the sister's son is, at least, a *Sapinda* of the father; and as such he would be clearly entitled, at all events, to rank as a *pitri-bandhu*, or father's cognate. In point of fact, however, he is also a *Sapinda* of the deceased proprietor himself, not so near as the daughter's son, but nearer than every one of those individuals who are admittedly recognised as *bandhus*.

It is a well known principle of Hindú law, recognised in all the schools current in the country, that the relation of *Sapinda* exists not only between the immediate giver and the immediate recipient of funeral oblations, but also between those who are bound to offer them to a common ancestor or ancestors. This principle is based upon the theory according to which a Hindú is supposed to participate after his death in the funeral oblations that are offered by one of his surviving relatives to some common ancestor, to whom he himself was bound to offer them when living; and hence it is that the man who gives the oblations, the man who receives them, and the man who participates in them, are all recognised as *sapindas* of each other. Thus, for example, brothers are not required to perform the obsequies of each other, but they are, nevertheless, *sapindas*, being connected with each other through the medium of the oblations that they are respectively bound to offer to their common ancestors. The same rule holds good in the case of the brother's son, and in fact of every *Sapinda* who does not stand in a direct line of ascent or descent with the deceased proprietor himself. It will be seen that six out of the nine individuals (p. 512) are no other relatives than the daughter's son of the paternal grandfather, the daughter's son of the maternal grandfather, the daughter's son of the father's paternal grandfather, the daughter's son of the father's maternal grandfather, the daughter's son of the mother's paternal grandfather, and the daughter's son of the mother's maternal grandfather. The remaining three are the son's

son of the maternal grandfather, the son's son of the father's maternal grandfather, and the son's son of the mother's maternal grandfather. Not one of these individuals, not even the highest among them, or in other words, the daughter's son of the paternal grandfather, is required to offer funeral cakes, either to the deceased proprietor himself, or to his father, or to his mother, but at the same time they are admittedly entitled to rank as the *Sapindas* of the man himself, or of his father, or of his mother, as the case might be.

We can scarcely imagine upon what principle of Hindú law it can be seriously contended that the daughter's son of the father is not a *Sapinda*, when the daughter's sons of the paternal and maternal grandfathers are acknowledged as such.

As regards the performance of funeral obsequies, the daughter's son of the father occupies the same position as a son's son of the father, or in other words, as a brother's son; whereas the daughter's son of the paternal grandfather, who is the highest in rank among the admitted Bandhus, does not stand an inch higher than the son of a paternal uncle. It is perfectly true that the lawyers of the Benares school sometimes use the word *Sapinda* in the sense of consanguinity, or mere connection through the body; but in either case the position of the sister's son would remain unaffected. We have already pointed out that as regards funeral oblations, the sister's son occupies the same position as a brother's son; and as to consanguinity, the very nature of his relationship with the deceased proprietor obviously shows that he is nearer than the nearest of the admitted Bandhus. If authority is needed on this last point, the following passage of the Mitákshará might be referred to as conclusive.

"The relation of *Sapinda* arises from connection as parts of one body. So the relation of *Ek-pinda* in the son with regard to the father arises from the connection as parts of the body of the father. And with the grandfather, &c., in consequence of the connection with their body through the father. In the same manner in regard to the mother, from connection as part of the body of the mother. In the same manner in regard to the maternal grandfather, &c., through the mother. In the same manner with the mother's sister and maternal uncle, and the rest, by reason of the connection or parts of one body."—*Mitákshará, Achár Adhyáya*, leaf 6.

It is scarcely necessary to point out, that in the passage before us, the maternal uncle and the sister's son are distinctly recognised as *sapindas* of each other. The whole doctrine of *sapinda*, according to the authorities of the Benares school, has been correctly expounded in the *Vyavasthá* cited in the case reported in the third volume of the Select Reports, page 37. The Pundits were unanimously agreed in declaring that there are two significations only in which the word *sapinda* is used by the lawyers of that School, namely, consanguinity and connection through funeral oblations; and the following passages from the *Parásara Mádhava* and the *Nirnaya Sindhu*, both of which works are recognised as authorities concurrently with the Mitákshará, were cited by them in support of this opinion.

"Those are *sapindas* who are connected by the tie of consanguinity; for instance, the father and the son are *sapindas* to each other, and the body of the father is perpetuated in the son without any intervention. So also is the son by the medium of the father a *sapinda* of his paternal grandfather, and of his paternal great-grandfather. So also the son by the medium of his maternal grandfather is *sapinda* of his maternal aunt and uncle, and by the medium of his paternal grandfather, he becomes a *Sapinda* of his paternal aunt and uncle, &c." *(Parásara Mádhava).*

"Those are *sapindas* between whom exists a reciprocity of giving or receiving funeral oblations. The fourth person and the rest share the remains of the oblation wiped off with the *Kusa grass;* the father and the rest share the funeral cakes. The seventh person is the giver of oblations, the relation of *sapinda* or men connected by the extension of the funeral cake, extends, therefore, to the seventh person, or sixth degree of ascent or descent. It should not be supposed that an uncle or nephew are not reciprocally *sapindas*, as he who shares in the oblations offered by the uncle, shares also in those offered by the nephew. *In short, if any one of those who participate in the funeral oblation offered* by one individual, be also the presenter of funeral oblations to one of his co-participators, then the whole number become *sapindas* of each other." *(Nirnaya Sindhu).*

It is perfectly clear that, according to either of these authorities, the sister's son is entitled to rank as a *sapinda*.

We have stated above that there are two significations only in which the word *Sapinda* is used in the Benares School, and the pleader for the respondent has not even been able to suggest a third. We might also add, that so far at least as the *Nirnaya Sindhu* is concerned, the sister's son is expressly recognised as heir, as the following passage will show:—

"In default of the brother's son, the father, mother, the daughter-in-law, the sister, and her sons are entitled to perform the *Sráddha*, because they are the heirs" (page 219).

We have shown by the foregoing remarks that the sister's son is entitled to remark as a *Bandhu* according to the definition of that term as given in the *Mitákshará*.

We will now proceed to examine the various objections that have been urged, both before us and elsewhere, against his right to succeed as an heir. These objections may be all classified under the following heads:—

1*st.*—That the definition referred to has no connection with the law of inheritance.

2*nd.*—That the enumeration of *Bandhus* made in verse 1, section 6, chapter 2, is exhaustive, and that the sister's son is neither included in that enumeration, nor mentioned as an heir in any other part of the work.

3*rd.*—That it has been settled by a uniform course of decisions, that the sister's son is not entitled to inherit under the Hindú law administered in the Benares School.

With reference to the first objection, we are of opinion that it is altogether untenable. The definition in question occurs in a part of the work which is exclusively devoted to the exposition of the law of inheritance, and it may be fairly asked, if it has no connection with that law, for what other purpose has it been introduced in such a place?

The second objection is also untenable. Verse 1, Section 6, Chapter II, runs as follows:—" On failure of gentiles, the cognates are heirs. Cognates are of three kinds,—related to the man himself, to his father, or to his mother, as is declared by the following text. " The sons of his own father's sister, the sons of his own mother's sister, and the sons of his own maternal uncle must be considered as his own cognate kindred. The sons of his father's

paternal aunt, the sons of his father's maternal aunt, and the sons of his father's maternal uncle must be deemed as his father's cognate kindred. The sons of his mother's paternal aunt, the sons of his mother's maternal aunt, and the sons of his mother's maternal uncle must be recognized as his mother's cognate kindred."

There is nothing, whatever, in this verse to justify the contention that the author of the Mitákshará intended thereby to lay down an exhaustive list of Bandhus or cognates. He says first of all that Bandhus are entitled to inherit in default of *gotrajas*; and, secondly, that Bandhus are of three kinds, namely, those who are related to the man himself, and those related to his father and mother respectively. The only argument, therefore, which can be advanced in support of this contention is the simple fact of his having concluded this sentence by quoting a text from one of the Hindú sages which contains the names of a limited number of Bandhus. We are of opinion that this argument, *per se*, is entitled to no weight whatsoever. Isolated texts from various Hindú sages, and of a similar description, are to be frequently found in the Mitákshará, and it would be manifestly erroneous to contend upon the authority of any one of them that an exhaustive enumeration of heirs was intended to be made thereby. The following text of *Vrihat Vishnu*, quoted in page 326 of (Colebrooke's edition of) the Mitákshará, might be referred to as an illustration.

"The wealth of him who leaves no male issue goes to his wife. On failure of her, it devolves upon the daughter; if there be none, it belongs to the father, if he be dead, it appertains to the mother?" It would be obviously improper to say, from the mere fact of the author of the Mitákshará having referred to this text, that he intended to declare that the particular persons mentioned therein are the only heirs to the estate of a deceased Hindú who has left no male issue; or that such even was the intention of *Vrihat Manu* himself. As to the particular text before us, there is absolutely nothing in it from which it can be reasonably inferred that the author of it at least, if not the author of the Mitákshará, had such an intention in view. All that it says is that certain relatives must be considered as Bandhus of one class, and certain others as Bandhus of two other classes respectively; it no where says that these persons are the *only* Bandhus recognised by the Hindú Law. The object

which the author of the Mitákshará had in view in referring to this text is evident. His own words are sufficient to show that this text was referred to merely for the purpose of establishing the three-fold classification of Bandhus.

The text of *Manu* which says, "to the nearest *Sapinda* the inheritance belongs," is frequently cited by him as a leading authority on all questions of Hindú Law. Indeed, the very definition of Bandhus, under our consideration, is based upon this fundamental doctrine, and in the very next verse he distinctly lays down that the order of succession to be observed among the different classes of Bandhus is to be regulated by "nearness of affinity." Are we then to suppose that the author of the Mitákshará has been so far forgetful of this fundamental principle, as to render himself guilty, unconsciously as it were, of the gross inconsistency of laying down a definition and of excluding those very persons who are best entitled to claim the benefit of it. In what way, we might repeat in this place, are the sister's sons of the father and of the mother better qualified to inherit than the sister's son of the deceased proprietor himself? What doctrine of Hindu Law, directly or indirectly sanctioned by the author of the Mitákshará can be cited in support of the contention that the maternal grandfather himself is not an heir, when his sons' sons and his daughters' sons, nay even when the sons' sons and their daughters' sons, of the father's and mother's maternal grandfather are acknowledged as such? How, again, are we to reconcile the proposition that the maternal uncle, or in other words the uterine brother of the mother, is to be excluded from the line of inheritance, when her cousins, namely the sons of her father's sisters and the sons of her mother's sisters, are to be included in it? Startling anomalies, like these cannot be imputed to an author without there being some tangible ground upon which such an imputation can rest. It is perfectly true that in the particular case before us, we are bound to administer the Hindú Law as it has been expounded by the author of the Mitákshará, but we can hardly be justified in ascribing such gross absurdities to him at the very time when he was really trying to extend the category of Bandhus by introducing the three-fold classification before alluded to.

The word '*Bandhu*' has been sometimes interpreted as distant kindred, but we can hardly suppose that the author of the Miták-

shará seriously intended to authorize the succession of the most distant *Bandhus* by sacrificing the right of those who are the nearest.

The following passages of the Mitákshará will remove all possible doubts on this point:—

"When one dies in a foreign country, let the descendants, cognates *(Bandhus)*, gentiles, or his companions take the goods, or, in their default the king. When he goes to a foreign country, of those who are associated in trade and dies, then his share would be inherited by his heirs, that is, the son and other descendants; cognates *(Bandhus)*, *i. e.*, the maternal side relatives, maternal uncle, and others; the gentiles that is the *Sapindas*, besides the son and other descendants; and those who are come, that is those among the associates who are come from a foreign country; or in their default, that is, of the heirs, *&c.*, the king shall take. The word *'va'* (or) shows that the heirs, *&c.*, are entitled in alternation. The rule as to this order is contained in the text "The wife, the daughter" *&c.*

It will be seen that the word '*Bándhava*' is expressly stated to include the maternal uncle, whoever else might be entitled to come in within the word 'others' which follows immediately afterwards. In the case of a foreign trader, therefore, it is perfectly clear that the maternal uncle is an heir, but before we can apply this argument to the general case, it is necessary to meet two objections that have been raised against such an application. The objections are: first, that the word used in this passage is '*Bándhava*' whereas the word used in the general text is '*Bandhu*'; and second, that the passage in question refers to an exceptional state of things, and can not, therefore, be accepted as a guide for the general case.

Both these objections are conclusively met by the express words of the author himself. It is distinctly stated by him that the order of succession applicable to this case is exactly the same as that laid down in the general text; and further, that the only necessity for making a separate text for the exceptional case arose from that of excluding the fellow pupil and the Bráhman, and of substituting the fellow traders in their place. It is perfectly clear, therefore, that the words '*Bandhu* and *Bándhava*' are of identical import, or, in other words, that the two texts are identical in every respect, except

as to the slight modification which relates to the fellow pupil and the Bráhman. The second passage, too, is equally decisive on this point. It is distinctly pointed out therein that the word maternal uncle used in the text of *Yájnavalkya* stands for all the three classes of *Bandhus* described by the author in his commentary upon the general text.

The *Víra-mitrodaya*, which is a work of high repute in the Benares School, concurrently with the Mitákshará, is also clear on this point: "Cognates are of three kinds, related to the person himself, to his father, and to his mother, according to the following text: "The sons of the father's sister, the sons of the mother's sister," &c. Here by reason of near affinity, the cognate kindred of the deceased himself in the first instance, then the father's cognate kindred, and next his mother's cognate kindred succeed. This is the order of succession. In the text of *Manu*, "then the distant kinsman shall be the heir, or the spiritual preceptor or the pupil. The term *Sakulya* comprehends the persons descended from the same family *(Sagotra)* and the kinsmen allied by common libations of water *Samánodaka*, the maternal uncle and the rest, and the three kinds of cognates. The term '*Bandhu*' in the text of *Yogíshwara* *(Yájnavalkaya,)* must comprehend also the maternal uncle and the rest, othterwise maternal uncle's sons and the rest would be entitled to succeed, and not they themselves, though nearer in affinity, a doctrine highly objectionable."—*Víra-mitrodaya*, (Sans.) page 209.

The *Viváda Chintámani*, which is a work of paramount authority in the sister School, which goes by the name of the Mithila School, is also of the same opinion, "the maternal uncle, and the rest" being expressly recognised in the category of heirs laid down in page 299 of Prosanna Coomar Tagore's translation of the work.

In the face of all these concurrent authorities, it seems impossible to contend, that an exhaustive enumeration of Bandhus was made in verse 1, Section 6, Chapter II, of the Mitákshará. It has been said that the sister's son is not entitled to inherit because he has been nowhere mentioned as an heir specifically by name; but this objection can be scarcely maintained if the doctrine of exhaustive enumeration falls to the ground. Apart from this last consideration, however, we do not see any reason why a specific enumeration

by name should be insisted upon in every case. An enumeration by a general name, accompanied by a suitable definition sufficiently illustrated, is as good as any other kind of enumeration, particularly when the general name in question is applicable to a large number of persons whose individual names it would be very inconvenient to specify in detail; and we do not see any reason why in this particular case we should insist upon anything more than what we have already got before us. The great-grandson, for instance, is no where mentioned as an heir distinctly by name; and yet it would be simply absurd to contend that the estate of a deceased Hindú is to go to the fellow pupil, or to the king even, if his own great-grandson is living. Similarly, when we now come to the *gotrajas*, we find that no one below the descendants of the paternal great-grandfather is expressly recognised by name in any part of the Mitákshará; and yet, it is a fact admitted on all sides, that the descendants of the remotest ancestors in the agnatic line, at least of those who stand within the fourteenth degree, are entitled to inherit in the Benares School. Why, then, are we to introduce this novel principle of interpretation when we come to deal with the Bandhus? There might have been some foundation for such an argument if the claimant had been a female relative, females, as a class, being generally supposed as having no right to inherit in consequence of their inability to perform religious rites: but in the case of male relatives, no restriction of any kind whatsoever can be cited to defeat their rights, if they are in a position to establish their status as *Sapindas*. We have shown that 'the maternal uncle and others are entitled to inherit in addition to those who are admitted as Bandhus. As far as the purposes of the present case are concerned, it is almost self-evident that if the maternal uncle is entitled to succeed as a Bandhu, the right of the sister's son would follow as a matter of course. We have seen that there is but one definition of the word *Bandhu*, and the very nature of the definition conclusively proves that if the maternal uncle is a kinsman from a different family, and allied by funeral oblations, the sister's son must necessarily be a kinsman of the same description.

It remains for us to meet the last objection. No doubt, if there were a uniform course of decisions establishing the doctrine that the sister's son is not entitled to succeed, we would have been scarcely justified in holding otherwise, however much we might have

been disposed to do so for the reasons set forth above. The fact, however, is that there is no such uniform course of rulings as has been erroneously contended for before us. The following are all the cases that might be referred to on the point:—

1.—Rajendro Narain *versus* Gocool Chand, Goh.—1st Select Reports, page 43.

2.—Ilias Koonwar *versus* Agund Rai.—3rd Select Reports, page 37.

3.—Sheo Suhaye Singh *versus* Omed Koonwar.—6th Select Reports, page 301.

4.—Case No. XI, Macnaghten's Hindú Law, Volume II, page 91.

5.—A decision of the Madras Sudder Court reported in page 247 of the printed cases for 1860.

6.—Stoke's Reports, Volume I, page 85.

7.—Chootee Lall *versus* Gooroodyal—Agra Select Reports, Volume V, page 198.

8.—Mohun Lall *versus* Thakooranee Sahibah.—Agra Law Journal, 1864, page 17.

9.—Jowahair Raoot *versus* Mussummat Kylasoo.—Volume I, page 75, Weekly Reporter.

10.—Sona Debi *versus* Biswambhar Sahoo.—4 Legal Remembrancer, page 168.

11.—Gridharee Lall *versus* The Secretary of State.—Volume IV, page 13, Weekly Reporter.

The first case has nothing to do with the particular point before us, and we would not have alluded to it at all, if Sir Thomas Strange had not stated upon the authority of that case, that the sister's son is *not* entitled to inherit in the Benares School. The contest in that case, however, was between the sister's son on the one side, and a *Gotraja Sapinda* on the other. The pandits who were consulted in it very properly declared that if the Bengal law were applicable to the case, the sister's son would be entitled to preference, but that the reverse would be the case according to Mithila law. The case was ultimately disposed of in favor of the sister's son, the Bengal law being held to be applicable; but there is not a single word, either in the decision itself, or in the *Vyavasthá* referred to, from which it can be gathered that the sister's son would not have succeeded as a *Bandhu* if the Mithila law had been adopted, if there were no *Gotraja* relatives in his way.

The second case has been already referred to in an earlier part of this judgment. It related to the daughter's son of the brother, and, as we have already seen, the only ground that was put forward for excluding him from the inheritance was the erroneous one of his not being a *Sagotra Sapinda.*

The third case is directly in favor of our interpretation. The question was, whether a daughter's son's son is entitled to inherit, and this question was determined in the affirmative upon the unanimous Vyavasthá of the pandits consulted on the occasion, including those of the Benares *Pátshálá.*

The fourth case clearly shows that the sister's son is entitled to succeed as a *Bandhu,* both according to the Benares law and according to the Mithila. This case is of particular importance, inasmuch as it appears to have met with the approbation of Sir W. Macnaghten himself, who has evidently cited it as a leading authority on the point. We might also add, that Sir W. Macnaghten had expressly stated in his note to case No. 5, reported in page 87 of the same volume, that the *Vyavasthá* given by the Pandit of Zilla Behar, in which the sister's son is ranked as a Bandhu, is conformable to the law as current in Benares, Mithila, and other provinces.

The fifth case is a mere dictum; but it is to be observed that the Pandit who was consulted on the occasion distinctly stated that the sister's son was entitled to inherit as a Bandhu, and no authority of any kind was cited or referred to contradict this opinion.

The sixth case is also a dictum, and the same remarks that have been made with reference to the preceding case apply to this case also.

The seventh case has nothing to do with the point before us. The dispute was between a brother's daughter's son and a *Gotraja,* and it was very properly held that the latter is entitled to succeed in preference to the former.

The eighth case is a mere dictum, but in this instance the dictum is in favor of the sister's son.

The ninth case arose from a dispute between the sister's son and an agnatic relation, and it was correctly held in that case that the latter is entitled to succeed. The learned Judges, however, who decided the case, went on to say that the sister's son is not entitled to inherit, either according to the Benares law or according to the

Mithila law. In the absence, however, of any further explanation on the point, we are rather disposed to think that all that was intended to be said, is that he is not entitled to inherit in preference to the *Gotraja;* but at any rate it is clear that this opinion cannot be treated as anything more than a mere dictum.

The next case, however, is directly to the point, and with all deference to the learned Judges who decided it, we are of opinion that it is based upon erroneous grounds. These grounds have been too fully examined by us in the preceding part of our judgment to require any further notice. We wish, however, to make one remark in this place, and that is, that the learned Judges appear to have been mainly influenced by the idea that the sister's son has never been recognised as an heir. With all deference to the learned Judges, we are bound to state that this was by no means the actual state of things at the time when their decision was pronounced, whatever it might be in this day. It is perfectly true that there is a paucity of decisions on the other side, but this fact appears to have mainly arisen from the peculiar doctrine of the Benares School by which the remotest relative in the agnatic line has been placed above the highest of the cognates. It might be added that very few cases, indeed, if any, can be pointed out in which the daughter's son of the paternal grandfather has been expressly recognised as an heir.

The last case relates to the maternal uncle of the father, and the grounds of the decision in this case being nearly the same as those in the one next above, no special remarks with reference to it are necessary.

Upon the whole, then, it must be admitted that the majority of the earlier cases at least are in support of our view; and of the more recent, there are two cases at most that are directly opposed to it. The last objection, therefore, must also be over-ruled.

For the reasons set forth above, I am of opinion that the question put to us by the Division Bench must be answered in the affirmative, or, in other words, that the sister's son is entitled to inherit under the Hindú Law administered in the Benares School.

Peacock, C. J.—I am of opinion that in the absence of nearer relatives, a man may be heir to his mother's brother as regards property subject to the Mitáksharâ. The question has substantially been decided by the Privy Council (17th July 1868) in the case of Gridharee

Lall Roy against the Government of Bengal,* in which it was held that the maternal uncle of the father of the deceased was not excluded from the class of Bandhus capable of inheriting, and that the text contained in Article 1, Section 6, Chapter II of the Mitákshará does not purport to be an exhaustive enumeration of all Bandhus who are capable of inheriting, that it is not cited as such or for that purpose by the author of the Mitákshará.

The judgment of Mr. Justice Dwarka-nath Mitter, which he has just read, and in which he has displayed great learning, ability, and research, was written before the decision of the Privy Council in Gridharee Lall *versus* the Government of Bengal was published here. My Hon'ble colleague has entered so fully into the reasons and exhausted the arguments in support of the view which he has taken, that it is unnecessary for me to do more than to say that I concur in the reasons which he has given in support of the conclusion at which he has arrived; and it is extremely satisfactory to find that it is entirely in concurrence with the view taken in the judgment of the Privy Council. The case must be sent back to the Judges who referred it.

Jackson, J.—I am of the same opinion. It is very satisfactory to feel that a conclusion so entirely consistent with reasons is also in full conformity with the Hindú Law, as is conclusively shown in the exhaustive judgment which has been prepared by Mr. Justice Mitter, and also that the view which we had taken of the subject has been, it may be said, simultaneously adapted by the highest tribunal.

Phear, J.—In referring this case to a Full Bench, I expressed the inclination of the opinion which I then held. Mr. Justice Mitter's very complete argument, in which I concur, has, I think, demonstrated that opinion to be correct. I would, therefore, answer the question in the words which have been used by the Chief Justice.

Macpherson, J.—I am of the same opinion.

Sutherland's Weekly Reporter, vol. X, F. B., p. 76.

The enumeration of *Bandhus* or cognates, who succeed, given in Section 6, Chapter II of the Mitákshará, is an exhaustive one, and, therefore, those *Bandhus* only succeed who are enumerated

* See 10, W. R., Privy Council, p. 31; and post, p. 522.

therein. A maternal uncle or a father's maternal uncle cannot inherit, as they are not among the persons enumerated.—*Government* versus *Gridharee Lall Roy.*—S. W. R., Vol. IV, p. 13.

Privy Council—*The 17th of July* 1868.

Present:

The Master of Rolls, Sir James W. Colville, Sir Edward Vaughan Williams, the Lord Chief Baron, and Sir Lawrence Peel.

*On Appeal from the High Court at Calcutta.**

Gri-dharee Lall Roy

versus

The Government of Bengal

Held that the list of *Bandhus* given in Article 1, Section 6, Chapter II of the *Mitákshará* is not exhaustive but simply illustrative of the proposition that there are three classes of Bandhus, and as such entitled to inherit in preference to the King, who cannot take to the prejudice of a maternal uncle or a maternal grand-uncle.

The *Vir-mitrodoya* is properly receivable as an exposition of what may have been left doubtful by the Mitákshará and is declaratory of the law of the Benares School.

The facts on which the determination of this appeal depends are few and undisputed. Woopendro Chunder Roy, the owner of the zemindary and other property in dispute, died on the 7th of August 1860, an infant and unmarried. He was of a family which formerly came from the Upper Provinces, and though settled in Lower Bengal, where the zemindary is situated, is admitted to have retained the ceremonial and other law of its original *habitat.* There is, therefore, no dispute that any question touching the succession to Woopendro Roy is determinable by the law of inheritance current at Benares.

On Woopendro's death the appellant, as the nearest male relative surviving him, performed his *shradh,* and claimed his property as heir, and shortly afterwards applied to have his own name substituted for that of the deceased as owner of the zemindary on the Collector's register. He is, however, but a remote kinsman of the deceased, being only the brother of his grandmother *ex-parte*

* 30th August 1865, (present Trevor, Officiating Chief Justice, and Campbell, J.); See 4, W. R. Civil Rulings, p. 13.

paternâ, or, to use the phraseology of the Mitákshará, his father's maternal uncle. And accordingly at the time of this application for mutation of names, some question whether the appellant was entitled to inherit, and whether the property did not pass for want of heirs to the Crown, was raised. Thereupon the Board of Revenue consulted their adviser, the Legal Remembrancer, and on his opinion, determined to recognize the title of the appellant, who accordingly was put into possession, or left in possession of the property, recorded as proprietor of the zemindary in the Collector's books, and continued to pay the Government revenue assessed upon it up to the date of the institution of this suit.

In 1863 the Government authorities appear to have changed their view of the appellant's title; and on the 3rd of August in that year the suit out of which this appeal has arisen was commenced against him in the name of the Government of Bengal, as representing the Crown, for the recovery of the real and personal property of Woopendro on the allegation that upon his death it had escheated for want of heirs to the Crown.

By the decree dated the 30th of September 1864, the Zillah Judge dismissed the suit, holding that the Government was not entitled to oust the appellant. The precise grounds of this judgment it is unnecessary to examine.

On appeal to the High Court this decision was reversed by two of the Judges of that Court. And the present appeal has been preferred against their decree.

The points ruled by the judgment of the High Court were :—

1st.—That the Government was not estopped by the acts of its officers in 1861, when the appellant applied for and obtained the mutation of names, from bringing this suit.

2nd.—That upon the true construction of the Section in the Mitákshará, which will hereafter be considered, the appellant, as the maternal uncle of the father of the deceased, was excluded from the class of "*Bandhus*" capable of inheriting, and that consequently, as between him and Government, he had no title to the property sued for.

The able arguments before this Committee have been principally addressed to the question raised by the second of the above findings, *viz.*, whether, under the law current at Benares, the appellant has

not a title to inherit the property preferably to the claim of the Government by escheat; and that question their Lordships will first consider.

Its determination will ultimately be found to depend on the construction to be given to the first article of the sixth section of the second chapter of the Mitáksharâ. The absolute exclusion of the father's maternal uncle from the list of possible heirs, for which the respondents contend, can rest on no other ground.

Mr. Forsyth, indeed, argued strongly against the right of the appellant to inherit, on the assumption that he was not entitled to offer the funeral oblations. But is this assumption well founded? There is evidence of the family priest and others, that the appellant did, in point of fact, perform the *shradh* of Woopendro; and he seems, in the judgment of the priest, properly to have performed that function in the absence of any nearer kinsman. It is, however, unnecessary to determine whether this act of the appellant was regular or not. The issue in this case is not between two competing kinsmen, but between a kinsman of the deceased and the Crown. Let it be supposed, for the sake of argument, that the nearest existing relative of Woopendro at the time of his death had been, not the appellant but a natural-born son of the appellant. It is admitted that, on the strictest interpretation of the Mitáksharâ, such a person is a Bandhu; that the three classes of Bandhus must be exhausted before the King can take for want of heirs; and, therefore, that the title of the appellant's son would prevail against the Crown. Now, such a Bandhu either is competent to perform the *shradh* of the deceased, offering some kind of funeral oblation, or he is not. If he be incompetent, it follows that his right to inherit is wholly independent of the doctrine of spiritual benefits derivable from funeral oblations, and is determined solely by kinsmanship. If he be competent, it follows *a fortiori* that his father would have been one degree nearer akin to the deceased, would also have been competent; and that *his* exclusion from the line of inheritance, if it exists depends upon some other principle.

It is impossible to read the second chapter of the Mitáksharâ without remarking the extreme jealousy with which the Hindú law regarded the right of the King to take on failure of heirs. The seventh section refuses altogether to recognise that right where the

property was that of a Brahman. Admitting it as to the property of the other castes or classes, it expressly says, "*if there be no relations* of the deceased, the preceptor, or, on failure of him, the pupil;" and again, "if there be no pupil, the fellow-student is the successor." It thus exhausts the relatives, and then interposes between them and the King three classes of heirs not connected with the deceased by blood, or participation in funeral oblations. The title of the King is afterwards stated affirmatively, thus:—"The King may take the estate of a *Kshatriya*, or other person of an inferior tribe, on failure of heirs down to the fellow-student." So *Manu* ordains:—"But the wealth of the other classes, on failure of all (heirs), the King may take." So far, then, the law would seem to be clear that the King cannot take the property to the prejudice either of a maternal uncle, or a maternal grand-uncle, each of whom is obviously 'a relation' of the deceased. What grounds, then, does the sixth section afford for the hypothesis that these two relations are arbitrarily excluded from the list of possible heirs? That section begins by stating broadly, "On failure of gentiles, the *Bandhus* (rendered by Mr. Colebrooke cognates) are heirs." But in this particular section it may be taken, as defined elsewhere by the Mitákshará itself, to import kinsmen springing from a different family (and therefore, opposed to '*gotraja*' or 'gentiles'), and connected by funeral oblations. From this class the maternal uncle, or the father's maternal uncle, (assuming their connection with the deceased by funeral oblations) can be excluded only by some arbitrary definition. The author of that treatise goes on to state, "Cognates (Bandhus) are of three kinds: related to the person himself, to his father, or to his mother, as is declared by the following text." And then follows, as a quotation, a more ancient text, (the authorship of which seems, from Mr. Colebrooke's note, to be uncertain), which says:—'The sons of his own father's sister, the sons of his own mother's sister, and the sons of his own maternal uncle must be considered as his own cognate kindred. The sons of his father's paternal aunt, the sons of his father's maternal aunt, and the sons of his father's maternal uncle must be deemed his father's cognate kindred. The sons of his mother's paternal aunt, the sons of his mother's maternal aunt, and the sons of his mother's maternal uncle must be reckoned amongst his mother's cognate kindred.'

If, for the determination of the question under consideration, their Lordships were confined to the four corners of the Mitákshará, they would feel great difficulty in inferring, from the omission of 'the maternal uncle' and 'the father's maternal uncle' from the persons enumerated in this text, that either of those relatives is incapable of taking by inheritance the property of a deceased Hindú in preference of the King. Such an inference, in the teeth of the passages which say that the King can take only if there be no relatives of the deceased, seems to be violent and unsound. For the text does not purport to be an exhaustive enumeration of all Bandhus who are capable of inheriting, nor is it cited as such, or for that purpose, by the author of the Mitákshará,—it is used simply as a proof or illustration of his proposition that there are three kinds or classes of Bandhus; and all that he states further upon it is the order in which the three classes take, *viz.*, that the Bandhus of the deceased himself must be exhausted before any of his father's Bandhus can take, and so on.

Again, further doubt is thrown upon the theory of exhaustive enumeration by the passage of the Mitákshará, which is not found in that portion of the Treatise which was translated by Mr. Colebrooke, but has been translated for the purposes of this suit. The general effect of that passage is to introduce in the case of a trader dying abroad, a new class of remote heirs, *viz.*, his returning co-traders. But this provision is preceded by an enumeration of preferable heirs, which includes, among Bandhus, the maternal uncle. Here, then, is a passage, written by the author of the Mitákshará himself, which treats the maternal uncle as capable of inheriting. The learned Judges of the court below meet this authority by suggesting that the heirship of the maternal uncle, as well as that of the co-trader, may be exceptional, and confined to the case of the trader dying abroad. Their Lordships, however, cannot admit the reasonableness of this hypothesis, and think that even on the Mitákshará the question under consideration is at least uncertain. That question, however, is not to be governed by the Mitákshará alone. Adhering to the principles which this Board lately laid down in the Ramnad case,* their Lordships have no doubt that the *Vira-mitrodaya*, which by Mr. Colebrooke and others is stated to be a treatise of

* See *ante*.

high authority at Benares, is properly receivable as an exposition of what may have been left doubtful by the Mitáksbará, and declaratory of the law of the Benares School.

After stating that the term *Sakulya*, or distant kinsman, found in the text of Manu, comprehends the three kinds of cognates, the commentator goes on to say,—"The term cognates (Bandhus,) in the text of *Jogishwara,** must comprehend also the maternal uncles and the rest, otherwise the maternal uncles and the rest would be omitted, and their sons would be entitled to inherit, and not they themselves though nearer in the degree of affinity,—a doctrine highly objectionable." The learned Counsel for the respondents remarked that this passage of the *Vira-mitrodaya* goes no further than to affirm the right of a maternal uncle, and that it says nothing of a maternal grand-uncle. But to say nothing of the use of the term 'and the rest,' the text is at least an authority for the proposition that a maternal uncle is a Bandhu. The maternal uncle of the father is, therefore, a Bandhu of the father, and it is admitted that, failing the Bandhus of the deceased, the Bandhus of the father are entitled to inherit.

This view of the law is confirmed by the majority of the consulted Pundits; it seems also to make the law of the Benares School consistent, on the point in question, with that of Bengal; and the concurrence of opinions of Mitra-misra, the author of the 'Vira-mitrodaya,' with Jimúta-Váhana, the author of the 'Dáya-bhága,' is not unimportant, since they are stated by Mr. Colebrooke (Preface, p. VIII) to differ on almost every disputed point of Hindú law.

Their Lordships do not think it necessary to consider at any length the decided cases which are cited in the judgment under review. It is admitted that there is no case precisely in point; and the authority of those cited, in so far as they go to support the theory that the enumeration of Bandhus, in the text quoted in the Mitákshará, is to be taken as exhaustive, has been shaken, if not altogether over-ruled, by the decision which, we are informed, has been recently passed by the High Court of Bengal in the case of *Amrita Kumari* v. *Lakhi-narayan Chuckerbutty*. The question under consideration must, therefore, be held to be an open one even in the Courts of India.

* That is *Yágnavalkya.*

Their Lordships, then, have come to the conclusion that, according to the law by which this case is to be governed, the appellant was capable of inheriting the property in dispute, and that his title thereto is preferable to that of the Crown; and, therefore, without holding the reasons given for his judgment, they think that the Zilla Judge did right in dismissing the suit.—S. W. R., Vol. X., P. C., p. 31.

According to the Hindú law of succession in force in the Madras Presidency, a sister's son is in the line of heirs.

Semble, he is a *Bandhu.*—*Chelikani Tirupati Ráya Ningáru* v. *Rajah Suraneni Vencata Gopala Nara-sinha Rae Bahadoor, Zemindar.*—Mad. H. C. R. Vol. VI., p. 278.

Calcutta H. C. A.—*The 26th of June* 1874.

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

Gunnesh Chunder Roy (Defendant) Appellant,

versus

Nil Komul Roy and another (plaintiffs) Respondents.

According to the general principles of Hindú Law, a sister's son is a preferential heir to a mother's sister's son, as being capable of conferring greater spiritual benefits upon the soul of the deceased.

Mitter, J.—The question in this case is, whether the plaintiff, who is the sister's son of one Mudoo Soodun, is a preferencial heir to one Kashee Nath who is Mudhoo Soodun's mother's sister's son. The lower Appellate Court has decided this question in favor of the plaintiff. In special appeal it is contended that that decision is against the provisions of the Mitáksharâ law. We do not think that this contention is correct. It has been decided by a Full Bench of this Court that the sister's son is a Bundhu,* to which class Kashee Nauth, who is the mother's sister's son, also belongs. It is clear that the sister's son confers greater spiritual benefits upon the soul of the deceased than his mother's sister's son. Therefore, according to the general principle of the Hindú Law, the plaintiff is a preferencial heir to Kashee Nath. There being no decided cases upon this point and in the

* See *ante*, page 505.

Mitákshará itself, the respective positions of these parties not being definitely settled, the general principle of the Hindú Law should be our guide in determining this question. We therefore affirm the judgment of the Lower Appellate Court, and dismiss the special appeal with costs.—S. W. R., Vol. XXII, p. 264.

In *Bombay* the sister's son inherits under the *Mayúkha.—Vide* Norton's Leading cases, part II, p. 536.

A father's sister's son is a *Bandhu*, and cannot succeed as long as there is a *Gotraja* or gentile, which term includes all those descended from the same primitive stock as the deceased (through males) as far as the fourteenth generation.—*Inderjeet Singh* v. *Mut. Hur Koonwar.*—S. D. A. Decis. for 1857, p. 637. *Vide* 2 Nort., p. 557.

A mother's sister's son is a *Bandhu.—Subbaraya Jatta-Vallabah* v. *Subbarayen.*—Mad. S. R. for 1859, p. 194. *Vide* 2 Nort. p. 557.

The great nephews by the mother's side of a deccased Hindú who died childless, were held to be entitled to share in his movable estate, on the death of his widow.—*Mussummat Umroot* v. *Kulyan Dass.*—Borr. Rep. Vol. I, p. 284 (1 Morl. Dig. p. 328).

CALCUTTA H. C. A.—*The 7th of August* 1872.

Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Ainslie.

Mussummat Doorga Bibee and another (Defendants),
versus
Janaki Pershad (Plaintiff).

A brother's daughter's son succeeds as heir, under the Mitákshará, in the absence of nearer heirs.

The facts of this case were as follows:—Zorawur Sing had two sons, Rogoo-nath Sing and Bood-nath Sing. Rogoo-nath Sing had two sons, Bish-nath Sing and Sheo-nath Sing (neither of whom, according

to the Plaintiff's case, left any legitimate sons,) and a daughter by name Sheo Daee. Sheo Daee left a son, the plaintiff. The plaintiff stated that the property of Bood-nath Sing, after Bood-nath's death, went to his widow Mungla Bibee, who died childless, and that consequently the plaintiff became entitled to the same; but that one Tulsi-rám, whose mother was a servant of the family, took wrongful possession of the property; and that after his death the property was taken possession of by his widow, the defendant, Doorga Bibee. Hence the plaintiff brought this suit to establish his right to succeed to the property as a brother's daughter's son under the *Mitákshará* law, and to set aside a certain alienation in favor of one Pireet Koonwar, one of the defendants in the case.

Couch, C. J.—The only question that remained was, whether the plaintiff being a brother's daughter's son could inherit the property, and that is settled by the decisions of the Privy Council in the case of *Gridhári Lál Roy* v. *the Government of Bengal** and of a Full Bench of this Court in *Amrita Kumari Debi* v. *Lakhi-narayan Chuckerbutty** where it was held that the enumeration of *Bandhus* in art. 1, s. 6, c. 2 of the *Mitákshára* is not to be considered exhaustive. That being so, there is no ground for saying that a brother's daughter's son cannot inherit in the absence of any nearer heir; and as it is not found in this suit that there is a nearer heir, the plaintiff is entitled to a decree.

The appeal must be dismissed with costs.—B. L. R. Vol. X, page. 341.

A Hindú woman of Behar, who had inherited the entire estate of her father, died, leaving sisters' son's sons, and a daughter. Held that the former succeed, and that *per capita,* and not *per stirpes.*—*Sheo Suhae Singh* and others v. Mussummat Omed Koonwar. Sel. S. D. A. Rep. Vol. VI, p. 301 (New. Ed. p. 378.)

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* See *ante* pages 505, 522.

Admitted legal opinions.

According to the law of inheritance, as current in Bengal, the father's sister's son is the eighteenth in the order of succession; but according to the law as current in Mithila and Benares, he is not entitled to the inheritance so long as there is a *gotraja* or gentile, which term includes all those descended from the same primitive stock, as far as the fourteenth generation.

Q.—A, (a Hindú,) died, leaving a widow and a father. Subsequently the father died, leaving a widow (B), not the mother of A, a minor son (C), and a sister's son (D). Afterwards C died childless. Subsequently to C's death, the widow (B) took possession of the property left by the father, and executed a will assigning over the entire property to her husband's sister's son (D), and died without putting the legatee into possession of the property willed away. In this case, is the will, according to the law as current in Mithila and Bengal, valid and binding? On the other hand, supposing no will to have been executed, does the property in question go to the sister's son of A's father, or to his widow, by right of inheritance?

R.—Supposing A to have died, leaving a widow and father, and the father to have died subsequently, leaving a widow (B), being the step-mother of the deceased A, a minor son (C), and a sister's son (D), and the minor C to have died childless, and subsequently to this, the widow of the father to have enjoyed the property in question, to have assigned it to her husband's sister's son (D) by the execution of a will in his favour, but to have died without putting D into possession of the property therein specified; in this case, according to the law as current in Mithila and Bengal, the will cannot be held to be valid and binding. And the heirs who are entitled to succeed to the property may be thus enumerated. The widow of the first deceased, (A,) who died before his father, is, according to the law as current in Mithila and Bengal, competent to inherit her husband's property, supposing it to have been divided and separated from that of his co-heirs. If the property was held in joint tenancy, his widow, according to the law as prevalent in Bengal, is entitled to succeed to that portion which was her husband's share; but, according to the law as current in Mithila, she would not be entitled to succeed even to this, for the law-expounders of that school declare, that the widow's right of succession depends on the partition of the joint stock, partition being, according to them, the sole cause

of creating individual proprietary right. Therefore of A's property so much as was not his *vibhakta* or divided, and *asádharana* or exclusive property, according to the law as current in Mithila, and so much as was not his individual proportion, or his share of the joint property, according to the law as current in Bengal, will, on the death of the first deceased son, (A,) devolve entirely on his father, even though his widow was living. On the death of the father, the whole property to which he (the father) succeeded, should have devolved on his minor son (C). At the death of such son, leaving no child, his property should have devolved on his next heir, that is, according to the law as current in Mithila, in default of heirs from the widow down to gentiles, on his father's sister's son, he being ranked among the cognates; and not before: but according to the law as current in Bengal, in default of heirs from the widow down to the grandfather's grandson, the father's sister's son is entitled to the succession, he being the grandfather's daughter's son.

This opinion is conformable to the *Viváda-chintámani* and other authorities, as current in Mithila, as well as to the Dáya-bhága and other law tracts, as prevalent in Bengal.

Authorities.

6. On failure of gentiles, the cognates are heirs. Cognates are of three kinds; related to the person himself, to his father, or to his mother; as is declared by the following text (of *Yájnyavalkya*). The sons of his own father's sister, the sons of his own mother's sister, and the sons of his own maternal uncle, must be considered as his own cognate kindred. The sons of his father's paternal aunt, the sons of his father's maternal aunt, and the sons of his father's paternal uncle, must be deemed his father's cognate kindred. The sons of his mother's paternal aunt, the sons of his mother's maternal aunt, and the sons of his mother's maternal uncle, must be reckoned his mother's cognate kindred. This must be understood to be the order of succession here intended. The *Viváda-chintámani*.

7. The following is a text of the *Dáya-bhága*:—"The succession of the grandfather's and great-grandfather's lineal descendants, including the daughter's son, must be understood in a similar manner, according to the proximity of the funeral offering."

8. In the case of non-partition, the text of *Sankha* cited in the *Viváda-chintámani* applies :—" To the childless wives of brothers and of sons, strictly observing the conduct prescribed, their spiritual parent must allot mere food, and old garments which are not tattered."

Sudder Dewanny Adawlut, December 18th, 1826.

Mussummat Hureea Beebee, *v.* Bhowanee Lal.—Macn. H. L. Vol. II, Chap. I, Section vi, Case 11.

The maternal uncle's son is heir after mother's sister's son, according to the Mitákshará.—Macn. H. L. Vol. II, Chap. I, Section vi, Case 12.

SECTION X.

RELATIVE TO ESCHEAT.

PRIVY COUNCIL.—*The 30th of July,* 1860.

Present:

Lord Justice Knight Bruce, Sir E. Ryan, Lord Justice Turner, Sir J. T. Coleridge, Sir L. Peel, and Sir J. W. Colvile.

On Appeal from the Sudder Dewanny Adawlut at Madras.

THE COLLECTOR OF MASULIPATAM,
versus
CAVALY VENCATA NARAINAPAH.

On the death of a Brahmin (whether sacerdotal or not) without heirs, the Sovereign power in British India is entitled to take his estate by escheat subject however to the trusts and charges previously affecting the estate.

Of the various questions that have arisen in this case, the only one which appears to have been argued in the Court of Sudder Dewanny Adawlut at Madras—certainly the only one decided by that Court—is; whether, on the death of a Brahmin without heirs, the Sovereign power in British India is entitled to take his estate by escheat. The decision of the Sudder Court upon this question strikes at the root of the appellant's title; and its correctness is therefore the first thing to be now considered.

The learned Judges of the Sudder Dewanny Adawlut have treated the question as one to be determined merely by Hindú Law; and, recognizing the general right of the Crown or other ruling power by escheat when there is a failure of heirs, having adopted and enforced an exception as to the property of Brahmins which is supposed to result from certain texts of *Menu* and other ancient authorities. The arguments addressed to us have also assumed the applicability of the Hindú Law; and their Lordships, therefore, purpose to deal primarily with the question, whether that law, as it now obtains in British India, has, if applicable to the case, been properly held to be fatal to the appellant's title.

For the exposition of the Hindú Law on the point, it is unnecessary to go back further than the Mitákshará. That treatise, the highest authority on the law of inheritance in the part of India where the zemindary, the subject of this suit is situate, comprises, amongst other authorities, the passage of *Menu*, which is principally relied upon. It is, however, from the consideration of the whole chapter of the work, and of the different authorities which are there collected, taken together, that we are most likely to arrive at a right conception of the law.

The important passages are in Articles 3, 4, and 5, of Chapter XI, Section 7.

From these it would appear that the beneficial enjoyment of a Brahmin's property ought not, on his death without heirs, to pass to the King; that it ought, in some way or another, to pass to other Brahmins. But the texts also show that, it is not to pass to Brahmins generally, or even to any definite or well-ascertained class of them. The persons to take the beneficial interest are to be Brahmins, having certain spiritual qualifications; they are to be pure in body and mind, and are to have read the three *Vedas*. If this be the law, it seems to imply a power of selection; and a right of possession, at least intermediate, of the property in somebody. It cannot be supposed that the first Brahmin, who could lay hands upon the property of a member of his caste dying without heirs, was to hold it, subject, perhaps, to the condition of showing that he possessed the personal qualifications which law requires.

It appears to their Lordships that the passage quoted by the Mitákshará from Nareda, in the very Section which cites the prohibition of *Menu*, shows what the law in its utmost strictness was. That passage is—"If there be no heir of a *Brahmana's* wealth, on his demise it must be given to a *Brahmana*, otherwise the King is tainted with sin." In other words, the King is to take the property, but to take it subject to the duty, which he cannot neglect without sin, of disposing of it at his discretion amongst Brahmins of the kind contemplated by the preceding texts.

If this be so, it appears to their Lordships that, according to Hindú Law, the title of the King by escheat to the property of a Brahmin, dying without heirs, ought, as in any other case, to prevail against any claimant who cannot show a better title: and that

to the last owner. This system is made the rule for Hindús and Mahomedans by positive regulation; in other cases it rests upon the course of judicial decisions. But when it is made out clearly that by the law applicable to the last owner, *there is a total failure of heirs*, then the claim to the land ceases (we apprehend) to be subject to any such personal law; and as all property not dedicated to certain religious trusts must have some legal owner, and there can be, legally speaking, no unowned property, the law of escheat intervenes and prevails, and is adopted generally in all the Courts of the country alike. Private ownership not existing, the State must be owner as ultimate lord. Consequently the claim of the Government, in the present instance, might have been considered with reference to this principle.

In the case of the East India Company *v.* the Mayor of Lyons (1 Moore, East India Appeals) the question arose whether an alien could hold lands in British India. Some of those lands were without the bounds of a Presidency town. It was decided on appeal here, that that part of the law of England, which disabled an alien from holding land against the claim of the Crown had not been introduced into India; but the reasons and principles of the decision do not appear to their Lordships to be inconsistent with the view that they take of the present controversy.

In the present case, if the Hindú Law had expressly provided that, upon the death of a Brahmin without heirs, ordinarily so-called, his property should pass to some definite person or class of persons; if, for instance, it admitted, in the case of a Brahminical succession, collaterals more remote than it would admit in the case of succession to a Sudra, there would be ground for excluding the title of the Crown, because there would, by Hindú Law, be some person in the nature of an heir capable of succeeding; but here the Court of Sudder Dewanny Adawlut rests its decision on what it terms "the primary declaration of *Menu* that the property of a Brahmin shall never be taken by the King." That declaration is contained in an Article (see *Menu* I, and 189) which, assuming a complete failure of heirs, negatives the King's right to Brahminical property, whilst it affirms his title to the wealth of all other classes in such circumstances. In so dealing with the question, the Sudder Court was,

we think, applying the actual or supposed Hindú Law, in derogation of the general right of the British Sovereignty.

Their Lordships' opinion is in favor of the general right of the Crown to take by escheat the land of a Hindú subject, though a Brahmin, dying without heirs; and they think that the claim of the appellant to the zemindary in question (subject or not subject to a trust) ought to prevail, unless it has been absolutely, or to the extent of a valid and subsisting charge, defeated by the acts of the widow Lutchmedavummah in her life-time. In the latter case, the Government will, of course, be entitled to the property subject to the charge.

It follows that the decree of the Sudder Adawlut cannot stand. The manner in which it ought to be varied depends upon the decision of the questions which have been raised on this appeal touching the effect of the acts of Lutchmedavummah in her life-time. On none of these has the Sudder Adawlut adjudicated. On some of them, as, for instance, the effect of the Collector's acts in 1841, it is particularly desirable to have the judgment of that Court. Again, it appears to their Lordships very doubtful whether the present record affords the materials requisite for the satisfactory decision of some of those questions. There is little, if any, legal evidence of the nature of the advances made to the widow, or of the necessity for them. It may also be material to know what was the nature, and what the effect, of the proceedings by which the execution of the *razee-namah* was suspended. In these circumstances, their Lordships, though they would have been glad to determine, if they could, this long litigation by a final decree, do not feel that they can safely do more than remit the appeal to the Sudder Adawlut for further hearing, with a declaration that the general right of the Government by escheat (subject or not subject to a trust) has been established. It is right, however, to state further their Lordships' opinion that the proceedings of the Sudder Adawlut, under the dates of the 27th of October 1853, and the 21st of October 1854, at pp. 32 and 34 of the Appendix, do not constitute any bar to the title of the appellant in this suit; but that they do amount to an award of possession, with which, in the present state of the cause, and until its final adjudication, their Lordships will not interfere.

Their Lordships desire again to suggest for the consideration of the parties, that some arrangement for the surrender of the zemindary to Government, upon payment of what is due to the respondent for the advances actually made, would probably meet the real justice of the case, and save both parties from protracted litigation. Sutherland's Privy Council Judgments, p. 417;—Moor. I. A. Vol. VIII, p. 500.

CHAPTER III.

RELATIVE TO SPIRITUAL PRECEPTOR, PUPIL, FELLOW-STUDENT, AND THE REST.

The goods of a *yati** are inherited by his *Shishya*†, and not by his *chelá*‡

A *bairági*§ is not necessarily such a religious devotee that his goods are inherited by his pupil in the event of intestacy.|| *Gobind Das* v. *Ram Suhae Jummadar* and others.—Fulton's Reports Vol. I, p. 331.

Admitted Legal Opinions.

An *Achárjya*, or spiritual teacher, is ranked among the heirs according to the Hindú law, but not a *guru*. In default of heirs, the property of a person deceased escheats to the King, except he be of the Brahminical order.

Q. On the death of a childless widow, who left apparently no heir, her property was seized by the ruling power, and a proclamation was issued for the appearance of her heir and representative within a certain period. After the expiration of the period fixed, a *gosain* appeared, and presented a petition for the property, alleging that the widow was his father's disciple; and he also proved, by the testimony of his four pupils, that she was his father's follower: but,

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* A sage, whose passions are completely under subjection, an ascetic.

† A pupil, a scholar.

‡ A pupil, disciple, a servant.

§ An ascetic, a devotee, one who has subdued his worldly desires; at present, the term in common use is applied to a particular class of religious mendicants.

|| This decision is given *in extenso* in the *Vyavasthá Darpana* (2nd. Ed.) p. 327.

according to the established usage of this country, no *gosain* has ever received any property of his disciple: under these circumstances, is the *gosain*, according to law, entitled to succeed as her heir; and can he, as such, claim her property?

R. In default of heirs down to the *samánodakas*, or kinsmen allied by the common libation of water, the succession devolves on the spiritual teacher (*áchárjya.*) The *gosain* is the widow's *guru-putra*, or the son of her spiritual guide. A *guru* is not termed an *áchárjya*. If the widow was not of the *Brahminical* order, her property should escheat to the king, who alone becomes heir. So *Menu* directs:—"The property of a Brahmin shall never be taken by the King: this is a fixed law. But the wealth of the other classes, on failure of all heirs, the King may take."

Zillah Hooghly, 3rd April, 1817.—Macn. H. L. Vol. II, Chap. I, Sect. vii, case 1.

A fellow disciple is by general usage allowed to be heir, in default of nearer claimants.

Q. A religious mendicant died, leaving no heir; but there is a person who calls himself the pupil of the same spiritual teacher with the deceased, and alleges that he is therefore entitled to the succession. Is such person recognized as a brother by the fraternity of mendicants?

R. There is no provision in the *Dáya-bhága* and other works of law,* that on the death of a religious mendicant his spiritual teacher's pupil has the right of succession to his estate, and there is no relationship between them; but the person who becomes a follower of the spiritual teacher is universally termed a religious brother by the fraternity of devotees. If such person attend the deceased on the point of death, and perform his exequial rites, and if the spiritual teacher himself disclaim all right of succession, such religious brother is entitled to the inheritance. This doctrine is justified by universal usage.† Macn. H. L. Vol. II, Chap. I, Sect. vii, case 2.

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* Certainly there is such a provision. See Dá. Bhá. (Coleb.) pp. 223 and 224; Dá. Kra. Sang. pp. 28 and 29; Coleb. Dig. Vol. III (Lond. Ed.) pp. 546—548 Mit.

† Not only by universal usage, but also by the Hindú Law: see the main book.

To the property of an ascetic his pupil or follower is heir, and not his relations by blood.

Q. A *Byragee*, or religious mendicant, having consecrated an idol, died, leaving considerable property. Subsequently to his death, his brother claims his estate; and a person who is a stranger to him in blood also claims the estate, and adduces sufficient evidence to prove that the mendicant had left the order of a house-keeper, had become an ascetic, and had made him (the claimant) his pupil and follower, on the strength of which he had performed the exequial rites of the deceased. In this case, which of these persons is entitled to inherit the property of the defunct?

R. Supposing the mendicant to have actually left the order of a householder, and to have become an ascetic, in this case, his follower or pupil is entitled to the inheritance, to the entire exclusion of his brother, whose fraternal relation can be held to have effect so long only as the proprietor continued in the order of a householder.

Authorities.

Vrihaspati:—"Decision must not be made solely by having recourse to the letter of written codes; since, if no decision were made according to the reason of the law, there might be a failure of justice.*"

August 5, 1817.—Macn. H. L. Vol. II, Chap. I, Sect. vii, case 3.

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* The above opinion is doubtless correct, though the authority in support of it appears wholly irrelevant. The following passage of the *Dáya-bhága* justifies the exposition of law as given in reply to the question. The goods of a hermit, of an ascetic, and of a professed student, let the spiritual brother, the virtuous pupil, and the holy preceptor take. On failure of these, the associate in holiness, or person belonging to the same order, shall inherit.—*Dáya-bhága*, page 223.

SECTION II.

SUCCESSION TO MOHUNTSHIP, &c.

CALCUTTA S. D. A.—*The* 15*th of August* 1806.

Present:

H. Colebrooke and J. Fombelle, *Judges.*

DHUN SINGH GIR (pauper), Appellant,

versus

MYA GIR, Respondent.

Claim by the appellant on the respondent, for a moiety of property possessed by a late *Mohunt.* On the proof that the respondent was installed as the *Mohunt's* successor at the celebration of the obsequies, judgment was given against the claim.

The parties in this suit were Hindús, of the religious order termed *Sanyásís.* The action was brought by Dhun Singh Gir, in the city of Benares, to recover from Mya Gir, a moiety of the property stated to have belonged to Toola Gir, the late *mohunt,* or principal of a religious institution, to which the parties were attached. The claim was preferred by the plaintiff on the ground that he and the defendant were appointed by the late *mohunt* to succeed jointly to his property, but that the defendant wrongfully kept possession of the whole. The defendant denied that the late *mohunt* had made any such provision, and stated the plaintiff's claim to be unfounded, and himself to be the sole successor.

According to the custom of the religious societies of the nature of that to which the parties belonged, it appeared, that, out of the *chelás,* or pupils, whom the *mohunt* in his capacity of *gooroo,* or spiritual teacher, instructs in the doctrine of the sect, some one is selected by him to succeed at his decease; and that, after his death, the *mohunts* of other similar institutes in the vicinage convene an assembly of the order, for performing the *bhandárá,* or funeral obsequies, at which they generally confirm the nomination made (by the deceased), and install the pupil, he selected, as his authorized successor. In the case in question it was proved by witnesses for the defendant, that the late *mohunt* appointed the defendant his principal pupil, and portioned off other pupils, that they might not

interfere with him; that he was installed as the successor at the celebration of the obsequies; and that the plaintiff was present at the time, and did not then set up any pretentions. It being in consequence the opinion of the city Judge, that the defendant was sole successor of Toola Gir, the plaintiff's claim was dismissed in the city court.

On appeal by the plaintiff from the above decision to the provincial court of Benares, and finally to the Sudder Dewanny Adawlut (Present, H. Colebrooke and J. Fombelle), those courts concurring in the judgment passed against the claim, respectively dismissed the appeal.*—Sel. S. D. A. Rep. Vol. I, p. 153 (New Ed. page. 202.)

CALCUTTA S. D. A.—*The 26th of September* 1806.

Present:

H. Colebrooke and J. Fombelle, *Judges.*

RAM-RUTUN DAS, Appellant,

versus

BUN-MALEE DAS, Respondent.

Claim to recover *lakheraj* lands which had been held by the late principal of a religious establishment. Judgment for the defendant on proof that he was duly appointed successor to the late principal.

This was an action brought by Bun-malee Das, in the zillah Court of Tirhoot to recover from Ram-rutun Das the *lakheraj* mouzah, Chooroot, Buram, &c. The parties were of the *Sunyási* Sect. The contested lands were situated in Tirhoot, and had belonged, in virtue of his office, to Jykishen Das, the late *mohunt* of a religious establishment situated partly in Tirhoot and partly in Nepal: each of the parties was a *chela* or pupil of this person, and each alleged having been appointed his successor. The evidence of respectable persons, for the plaintiff, agreed in the following circumstances, *viz.*, that, shortly after the decease of the *mohunt*, the principal persons

* According to the established usage of the religious order of the *Gosains* or *Sanyasis*, the installation of the respondent, as *mohunt* at the obsequies of the deceased, was conclusive. The several courts gave no credit to the special agreement alleged by the appellant; and maintained, by the decree in the cause, the regular election in conformity to the usage of the order.—Note by Mr. Colebrooke.

of the order, together with the pupils of the deceased, and the *mohunts* of the surrounding districts were convened, for performing the obsequies; and that after the accustomed ceremonies, they declared the plaintiff successor to the deceased, and installed him as principal of the establishment. On this evidence, and on proof that, according to the engagement produced by the plaintiff, the charge of the lands had been accepted from him by the pupil of the defendant, it was the opinion of the Zillah Judge, that the plaintiff was the person legally entitled to the possession of them as authorized successor; and judgment was accordingly given in his favor in the Zillah Court.

On appeal by the defendant from the above decision to the Provincial Court of Patna, and finally to the Sudder Dewanny Adawlut (present H. Colebrooke and J. Fombelle), those Courts respectively concurred in it, and dismissed the appeal with costs.—Sel. S. D. A. Rep, Vol. I, p. 170 (New Ed. p. 226).

CALCUTTA S. D. A.—*The 9th of November* 1807.

Present:

H. Colebrooke and J. Fombelle, *Judges.*

GUNES GÍR, Appellant,

versus

UMRAO GÍR, Respondent.

On a claim by a *Sanyási*, to the succession to a deceased *Mohunt*, it appearing that the claimant was principal pupil of the deceased, and was installed as his successor at the obsequies by an assembly of *mohunts*, judgment given in his favor. The successor to a *gooroo*, or spiritual teacher, must, by the law of the *Sanyási* sect, be a *chélá* or pupil of the deceased.

The parties in this case were Hindús of the *Sanyási* sect. The action was brought by the late Tej Gír in the Zillah Court of Sarn to recover from Gunes Gír the lands of Asookee Pursotum and other mouzahs held exempt from revenue for the support of a religious institution, and attached to the office of the *mohunt* or principal of the establishment. The last person who presided over the institution as *mohunt*, with an acknowledgd title, was Prem Gír, who died in the year 1195, and of whom the plaintiff was admitted to

have been the *chelá* or pupil. The plaintiff alleged, that after the late *mohunt's* death, he regularly succeeded to his office as the principal *chelá*, and held possession accordingly; and that at the funeral obsequies, he was confirmed as the successor by the usual public election; notwithstanding which, in the month of *Cheit* 1206, he had been wrongfully dispossessed by the defendant.

The defendant denied that the plaintiff had been in possession, as stated by him, or that there had been any constituted *mohunt*, before 1205, since the decease of the last incumbent. He stated, that he (the defendant) was the legal successor; that at the time of the *mohunt's* death, he was absent at Nepal, but returning from thence after a lapse of ten years, convened an assembly of the sect, in Jeith 1205, to perform the obsequies of Tej Gír, and was then elected his successor, and entered on the office. The Zillah Judge, considering the defendant to have been duly elected, and to be entitled to the office of *mohunt* in preference to the plaintiff, gave judgment against the latter.

On appeal by the plaintiff from the above decision to the Provincial Court of Patna, the decree passed by the Zillah Judge against the claim was reversed by that Court.

On the institution of an appeal by Gunes Gír from the decision of the Provincial Court to the Sudder Dewanny Adawlut (present, H. Colebrooke and J. Fombelle), Tej Gír, the respondent, died; and Umrao Gír, stating himself to be the *khás chelá*, or principal pupil, and heir, succeeded him in the defence of the cause. On going into the case, the Court observed, that witnesses on the part of the appellant deposed to his having been elected *mohunt*, at the obsequies of Prem Gír, in Jeith 1205; and on the other hand, the witnesses of Tej Gír, the original respondent, declared *him* to have been the person appointed; which contradictory accounts appeared to leave the actual election uncertain; but Tej Gír, as the *chelá* of the deceased *mohunt*, rested his claim to exclusive succession on that ground, as well as on the alleged election, insisting, that the appellant, as not being a *chelá* of the deceased *mohunt*, was on that account unqualified for the office. On reference to former cases decided by the Court respecting disputed successions to the office of *mohunt*, it appeared, that the succession had been always adjudged to a *chelá* of the last

incumbent, but it had not been declared whether or not a person, who was not a *chelá*, was necessarily excluded from the office. To determine this point, and to ascertain in whom the succession in the present instance was legally vested, it appeared proper to the Court to cause a new election to be made; more especially as the respondent, if he were really the person entitled to succeed, could not be placed in the office by the Court, without being regularly elected. An order was accordingly issued, through the Provincial Court, that the Zillah Judge should convene, on the spot where the religious establishment in question was situated, a *punchayut*, or assembly, of the principal persons of the sect, who should proceed to a new election, and determine, what person was entitled to succeed to the office in question, specifying the ground of such person's right to the succession, particularly if he should not be a *chelá* of Prem Gír, or of Tej Gír; and that, previously to the award of the *punchayut* being transmitted to the Sudder Dewanny Adawlut, the opinions of the pundits in the Zillah and Provincial Courts should be taken on its legality and correctness. The award given by the *punchayut* assembled in consequence of this order, after reciting, that Gunes Gír was never elected, though he had intrigued with some persons of the sect, and got possession of the *muth* or temple, stated, that, according to the usage of the sect, the proper successor to a *mohunt* is his *khás chelá*, or principal pupil; that, at the obsequies of Prem Gír, Tej Gír, his principal pupil, was elected his successor; and that Umrao Gír, the principal pupil of Tej Gír, was the person now entitled to the office, and had been elected accordingly. The pundits of the Zillah and Provincial Courts certified the legality of this award; and the pundits of the Sudder Dewanny Adawlut having been also referred to, reported, that "by the law of the *Sunyásí* sect, a *guru*, or spiritual teacher, must be succeeded in his rights and possessions by his *chelá* or adopted pupil." In conformity with the award of the *punchayut*, and the opinions of the law officers of the respective Courts, the Sudder Dewanny Adawlut determined, that the appellant had no title to be *mohunt* of the establishment in question; that, on the decease of the *mohunt* Prem Gír, Tej Gír (the original claimant) was his legal successor, as being his pupil, duly elected at his obsequies; and that, on the

death of the latter, the present respondent, on the same ground, was the person entitled to succeed.*

CALCUTTA, S. D. A.—*The 26th of November* 1810.

GUNGA DAS and MUNGUL DAS,
Chelás of KRISHNA-RAM, deceased, Appellants,
versus
TILUK DAS, Respondent.

This action was commenced by the late Krishna-ram, in the Zillah Court of Tirhoot, against Tiluk Das, to recover the office of *mohunt* of a religious establishment.

The (Sudder) Court, not considering the claim of the late Krishna-ram, or of his *chelás,* the appellants, to the office of the *mohunt* of the establishment in question, to be established, affirmed the decree passed by the Provincial Court. But as it appears that, at the decease of Dyal Das in 1191, and at the demise of Churn Das in 1203, no *bhundara* assembly was convened to determine and appoint the successor, which by the usage of the sect, ought to have been the case, the Court directed that Tiluk Das, the present successor, assemble a *bhundara* for that purpose; and that in the event of his not assembling it within six months, the Zillah Judge attach the property, and cause a *bhundara* to be assembled, and place the person, *then* elected, in possession of the office of *mohunt;* reporting the same for the information and approval of the Court.—Sel. S. D. A. Rep. Vol. I, p. 309 (New Ed. pp. 414—418.)

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* The established usage of the religious order of *Sunyásis,* or *Gosains,* in the election of a successor to the office of *mohunt,* was stated in the case of Dhun-sing Gir *versus* Mya Gir, August 15, 1806. Another case in which the successor was nominated by the *mohunt* for the time being, and his nomination confirmed by the assembly convened at his funeral obsequies, will be found in the case of Ram-rutun Das *versus* Bun-malee Das, December 15, 1806. But the present decision establishes a precedent where no successor has been nominated; and it may be considered the ascertained rule, in such cases, that "the proper successor to a *mohunt* is his *khás chelá* or principal pupil;" though from the result of former enquiries (in the case above noticed) the election and installation of the successor by an assembly of *mohunts,* at the obsequies of the deceased *mohunt,* appears to be in all cases indispensable and conclusive. The exposition of the law of the *Sunyási* sect, given by the pundits in this case, further declares, that a *guru,* or spiritual teacher, (who, being restricted from marriage, can leave no legitimate children) must be succeeded in his rights and possessions by his *chelá,* or adopted pupil.—Note by Mr. H. Colebrooke.

CALCUTTA, S. D. A.—*The 17th of June* 1839.

MOHUNT RAMANOOJ DASS, Appellant, *versus* MOHUNT DEB-RAJ DASS, Respondent.

Claim for the office of preceding *mohunt* of a temple at Juggur-nath was decided in favor of the plaintiff, on the grounds of his having been the principal *chelá* or pupil of the late *mohunt*, of his having been nominated by the latter to the succession, and, of the nomination having been adhered to by the appointing *mohunt*, during the latter years of his life; against the claim of the defendant, who had a prior nomination to the succession by the same party, and pleaded a deed of gift, in his favor, of the temple and its appendages.

This was an appeal from a judgment of the Zillah Court of Cuttack, in a case in which the appellant was plaintiff and the respondent was defendant.

The petition of plaint was to the following effect:—A certain *muth* or temple called *Utrpárus*, situated in the village of Marcandessur Sahee, with all its appendages, belonged to my ancestors, and is my hereditary property. The family custom is for the presiding *mohunt* to invest his eldest disciple with the *kunthee* (necklace of beads) of *adhikari*, or possessor of the right or title and manager of the daily concerns of the temple, and having caused all the principal *mohunts* to do the same, to appoint him to the performance of the duties of the *muth*. The disciple so appointed remains under the orders of his *guru* (in this, the presiding *mohunt*,) and performs the duties. In the event of the disciple not being qualified for the office, the presiding *mohunt* is at liberty to select a qualified person from amongst his fellow *mohunts* and such person succeeds to the office of *mohunt*, on the death of the existing *mohunt*. The *muth Utrpárus* was erected by my ancestor Bhugwan Dass, who received the *kunthee* from the principal *mohunts*, and was installed in the office of the chief *mohunt*. He obtained a grant under the title of '*Umrut Manohee*,' of certain lands as an endowment to the *muth*, to support the worship of Juggur-nath; he appointed Ram Dass, his senior disciple, the *adhikari*, and died. Ram Dass on becoming *mohunt*, obtained a grant of more lands, and, before his death, appointed his head disciple Ram Issur Gossain, the *adhikari*. Prau-kishen Dass, appointed in the same way by

Ram Issur Gossain, still further increased the lands appertaining to the endowment, and appointed Narain Dass to succeed him. He likewise obtained further grant of lands, but his senior disciple Jankee Dass not being qualified, he selected and appointed Jyram Dass one of his fellow *mohunts* as *adhikari*. Jyram Dass having succeeded to the office of *mohunt* on the death of Narain Dass, obtained, from Rughoojee Bhonslah, pergunnas Bhodar and others as a grant to the *muth*, and appointed me, his eldest disciple, the *adhikari*, or successor to the *mohuntee*. I accordingly administered the functions of the office.

The defendant repelled the claim at considerable length. He stated that the plaintiff was never appointed *adhikari* by Jyram, who never invested him with the insignia of the office.

The Zillah Judge, gave judgment on the 28th of December 1836.

From the above judgment the plaintiff appealed to the Sudder Dewanny Adawlut.

The case was first laid before Mr. Money, who directed further investigation, through the Zillah Judge, as to the usages and customs current among the different establishments of the *muths* at Juggurnath in regard to the selection and appointment of a superintendent; and also enjoined a reference to the pundit of the Zillah Court of Cuttack for a *Vyavasthá* declaratory of the law in the case.

The reply of the Judge stated that he had taken depositions of some of the most respectable *mohunts* of Pursottum Chhuttur, and that their evidence went to prove that the *muths* were of three descriptions, *viz.*, *mouroosee, punchaitee,* and *hákimi*; that in the first, the office of chief *mohunt* was hereditary, and devolved upon the chief disciple of the existing *mohunt,* who moreover usually nominated him as his successor, that in the second, the office was elective, the presiding *mohunt* being selected by an assembly of *mohunts*; and that in the third, the appointment of the presiding *mohunt* was vested in the ruling power, or in the party who endowed the temple ; and that the *muth,* the *mohuntee* of which was now under litigation, was of the first mentioned class. The Judge added that there was no law officer attached to his Court to whom he could make the reference ordered by Mr. Money.

Mr. Money then directed the pundit of the Sudder Dewanny Adawlut to state what was the law of the *shaster* in regard to the appointment of a presiding *mohunt* of a *muth* or temple called "*mouroosee*;" whether the principal disciple of the last *mohunt* should succeed? or whether the existing *mohunt* was competent to appoint whom he pleased from among the body of his disciples?

The reply of the pundit was as follows:—Under the circumstances stated in the question, the principal *chelá* or pupil is entitled to succeed on the death of the presiding *mohunt* of a *mouroosee* or hereditary *muth*. If the principal pupil be personally unfit to succeed, or be disqualified by any of those causes which according to the *shaster* are sufficient for such disqualification, then, in that case, the presiding *mohunt* should, during his life-time, select one properly qualified from among his pupils to succeed him. The person so selected will succeed."

Authorities:—

1. *Manu*:—"The first born is in this world the most respectable, and the good never treat him with disdain."—*Institutes*, Chap. IX, *v.* 109.

2. *Yájnavalkya*:—"The heirs to the property of a hermit, of an ascetic, and of a student in theology, are in order (that is, in the inverse order,) the preceptor, a virtuous pupil, a spiritual brother belonging to the same hermitage."—*Miták.* Sect. VIII, § 2.

3. "The virtuous pupil is one who is assiduous in the study of theology, in retaining the holy science, and in practising its ordinances."—*Miták.* Sect. VIII, § 4.

The case was again laid before Mr. Money on the 14th of February 1839, who proposed judgment as follows:—

"It is proved that the plaintiff was the principal pupil of the late *mohunt* Jyram Dass, and that the late *mohunt* invested both the plaintiff and the defendant at different times with the *kunthee* or necklace, in token of appointment to the succession. The issue of the case must therefore depend upon the Hindú law as applicable to the case. This has been declared by the pundit of this Court to be in favor of the plaintiff as the chief pupil, provided he be not disqualified for the office. The defendant declares that plaintiff is disqualified, because he has been convicted of theft, and

because he left the *muth* and resided elsewhere. Now it is clear that these did not constitute disqualifying objections in the mind of the late *mohunt* Jyram Dass, for he constantly wrote to the plaintiff after these occurrences, urging him to return to the temple and undertake its duties, which in fact he at last did. The same letters show that Jyram was dissatisfied with the defendant, and this in itself may be considered as a disqualifying cause. As for the *kiba-namah,* and *baz-namah* and other deeds filed by the defendant, I place no reliance upon them, for the evidence in regard to them is of a very doubtful character. I would reverse the decree of the lower Court, and give judgment in favor of the original plaintiff.

On the 4th of June 1839, the case was heard by Mr. Tucker, who put further questions to the pundit of the Court desiring to state what according to the Hindú law were the causes which disqualifies for succession to the office of *mohunt.*

The pundit replied that instead of entering into any detail respecting them, he would cite the authorities which declared them :—

1. *Manu* :—" Eunuches and outcasts, persons born blind and deaf, mad men, idiots, the dumb and such as have lost the use of a limb, are excluded from a share of the heritage."—Chap. IX, *v.* 201.

2. *Manu* :—" The killing of a Brahmin, drinking forbidden liquor, stealing gold from a priest, adultery with the wife of a father, natural or spiritual, and associating with such as commit those offences, wise legislators must declare to be crimes in the highest degree."—Chap. XI, *v.* 55.

3. *Yájnavalkya* :—" An impotent person, an outcast, and his issue, one lame, a mad man, an idiot, a blind man, a person inflicted with an incurable disease, as well as others (similarly disqualified) must be maintained; excluding them, however, from participation."—*Mitákshará*, Sect. X, § 1.

4. Gloss of *Vijnáneshwara* :—" Under the term 'others,' are comprehended one who has entered into an order of devotion, an enemy of his father, a sinner in an inferior degree (such as killing a cow,) a person deaf, dumb, and wanting any organ."—*Mitákshará*, Sect. X, § 3.

On receipt of this *Vyavasthá* the cause was again heard by Mr. Tucker, who passed the following judgment :—It appears that Jyram

Dass had held the office of the presiding *mohunt* for about 40 years: during this period, he at different times appointed parties to the present suit to succeed to him, at one time dissatisfied with one of them, and at another with the other. He did not at first nominate the appellant as his successor; but in 1208 Umlee he appointed the respondent as his *adhikari*, and in 1215 executed to him a deed of gift, which afterwards led to numerous disputes between Jyram Dass and the respondent. In order to arrive then at a just decision in this case, it is necessary to inquire what was the intention of Jyram in regard to the succession, during the four or five years preceding his death. The appellant claims upon the ground of his being the principal pupil of the *mohunt*, of his having appointed him as successor in an assembly of the *mohunts*, and of his having continued in close intimacy with, and in the service of, the late *mohunt* up to the period of the death of the latter. The respondent claims in virtue of his prior nomination to the succession, and of the *heba-namah* or deed of gift in his favor, and on the ground of all differences between him and Jyram having been settled prior to Jyram's death as shown by the *razee-namah* and *safee-namah* in the suit between them. In regard to the *razee-namah* and *safee-namah* the appellant replies that they were filed without the knowledge and consent of Jyram Dass. Now it is clear from the admission of both parties that the appellant was the principal pupil of the late *mohunt*, and thus according to the Hindú law as expounded by the pundit, has *primâ facie* the right of succession. The assertion of the respondent that he held undisturbed possession of the temple and regularly transacted its duties, is not established; on the contrary it is proved that Jyram Dass ejected him for misbehaviour; and having done so never reinstated him in possession, notwithstanding the alleged execution of the *razee-namah* and *safee-namah*. In favor of the appellant it appears that Jyram Dass called him from Calcutta, and invested him with the collar of the *adhikari*; there is no proof whatever of the appellant having incurred the displeasure of Jyram from the year 1823 to 1830, whereas it is equally clear that during the whole of that period there were constant disputes between Jyram and the respondent. No reliance can be placed upon the *razee-namah* and *safee-namah*. Then again it is objected to the appellant that in consequence of a criminal convic-

tion he is not a fit person for the office of *mohunt.* Whatever may be thought of this objection by others, it must in this case be considered with reference to the opinions and sentiments of those of the same class as the parties, and who must be considered as the most competent to judge of the matter. None of them objects to the appellant on this ground: nor does the Rajah Ram Chunder Deo bring this forward as any objection to the appointment of the appellant. None of the disqualifying causes mentioned by the pundit appears against the appellant: and it is proved that he was in possession of the *muth* and executed its duties for some years from 1831 to the death of Jyram Dass, when the respondent put forward his claims, and finally ejected the appellant under the orders of the Collector. For the foregoing reasons I concur with Mr. Money, and confirm the decree proposed by him, reversing the judgment of the lower Court.—Sel. S. D. A. Rep. Vol. VI, p. 262 (New Ed. page 328).

A suit by a *chelá* of *Sravuk Guru* to obtain possession of the temple of his sect at *Surat,* in quality of heir to the last *Guru* was dismissed, because the Sett or the chief of the sect at Ahmedabad was possessed of the sole power of appointing a *Guru,* and had already nominated another person. At the same time the Court held, that if the *chelá* could establish his right at Ahmedabad, and bring a certificate to that effect from the Mahajuns of that city, he should be put in possession of the Upasura, and confirmed in all the rights and privileges of the office at *Surat.*—*Bhutaruk Rajendru Sagur Sooryu* v. *Sook Sagur* and another.—Borr. Rep. Vol. I, p. 351 (1 Morl. Dig. p. 331).

The nephew of a deceased *Brahmachári* was appointed to succeed to the *Gaddí* of a religious endowment, on proof of his title being superior to that of the person in succession (the *chelá* of the late incumbent) the evidence adduced showing that the last incumbent had intended him to be his successor in the office; and that the *chelá* had usurped the *Gaddí* of the late *Brahmachári* with the aid of certain ill-disposed persons, during the absense of the nephew, the rightful successor.—*Sreeram Brahmachári* v. *Surbsook Brahmachári.*—Sel. S. D. A. Rep. Vol. III, p. 358.

One of six *chelás* of a *Boirági Guru* having alienated a *Mondir* without the consent of the others, such alienation was declared to be illegal under an award of arbitration, as among the *Boirágis* it is an unalterable rule that the *chelás* are joint heirs of the *Mondir*, and have an equal interest in it.—*Gopal Dass Kishen Dass* v. *Damodhur chelá* and others.—Borr. Rep. Vol. I, p. 397 (1 Morl. Dig. p. 331).

CALCUTTA S. D. A.—*The* 31*st of June* 1810.

SURBANUND PURBUT, Appellant,
versus
DEO-SING PURBUT, Respondent.

In a suit for possession of the endowed lands of the *mohuntee*, the plantiff, between whom and defendant there had been disputes about the right of succession to the late *mohunt*, determined by a *punchayut* or assembly of *mohunts*, convened by order of the Sudder Dewanny Adawlut, to be the rightful successor; and possession adjudged to him accordingly.

This was an action brought by Surbanund Purbut in the Zillah Court of Sarun, to recover from Deo-sing Purbut about 502 beeghas of land held free of revenue for the service of a *muth*, or temple.

The Zillah Judge, considering the plaintiff to have been duly constituted *mohunt* by the award of the *punchayut*, and the lands and other appurtenances of the *muth* being held by the person filling that office, judgment was passed by the Zillah Court for the plaintiff's recovering possession of the lands claimed by him with costs against the defendant.

On appeal by the defendant from the above decision to the Provincial Court of Patna, that Court on the ground of its appearing from the evidence of the *Mohunts*, or *Gossains*, who signed the award in favor of the plaintiff, that they assigned to him the office of *mohunt*, in consequence of the assent or selection of the *chelás* of the late *mohunt* without calling for the defendant's documents or evidence, and without themselves determining on the respective claims of the parties; and it appearing to the Court to be proved by the testimony of witnesses for the defendant, examined by order of the Court, that the late *mohunt* did actually select the defendant for his successor; and Court having received

a written answer to a reference made by them to two of the chief *mohunts* in their division declaring that the appointment by the deceased *mohunt* was valid, and that an election in opposition to his choice was not so, the Court considered the defendant the person entitled to succeed to the *mohuntee* and the rights attached to it; and accordingly gave judgment in his favor, reversing the decree of the Zillah Judge.

On a further appeal to the Sudder Dewanny Adawlut, the Court, as the claimant had been placed in the office of *mohunt* on the presentment and choice of the *chelás* of the deceased without the claim of the respondent being duly investigated, deemed it proper that a new *punchayut* should be assembled, to determine according to the custom and usages of the sect, which of the parties, or what other person, was legally entitled to succeed to the late *mohunt*. A *punchayut* having been accordingly assembled by the Zillah Judge, their award, transmitted to the Court, recited, that the members of the *punchayut* after enquiring into the claims of the respective parties, according to a long established usage, were of opinion that the appellant was the person entitled to succeed to the *mohuntee* in dispute, as well as to the property left by Sheo Purbut, and that, the respondent had merely a right to maintenance. In conformity with this award, the Sudder Dewanny Adawlut (present, Mr. J. Harington and Mr. J. Fombelle,) reversed the decree of the Provincial Court and affirmed that of the Zillah Judge, decreeing that the appellant should have possession of the lands as *mohunt* of the establishment.—Sel. S. D. A. Rep. Vol. I, p. 296 (New Ed. p. 396.)

The office of Superintendent of a Hindú religious establishment, having been by usage elective, such usage must be adhered to, in preference to any other mode of succession, nor any relinquishment or device by the incumbent, in favor of another person, operate further than as a nomination, which to avail, must be confirmed by the usual mode of election.—*Narain Dass* (pauper), v. *Bindrabun Dass.*—Sel. S. D. A. Rep. Vol. II, p. 151 (New. Ed. p. 192).

A *mohunt* in charge of an endowment, with only a life interest in the property, cannot create an interest superior to his own, or except under the most extraordinary pressure and for the distinct benefit of the endowment bind his successor in office. If a purchaser from

such *mohunt* retained possession after the *mohunt's* death, the successor to the *Guddee* would have a cause of action against him from the date of the election: and no length of possession during the vendor's life time would give the purchaser a valid title as against the present *mohunt.—Mohunt Burm-surroop Dass* v. *Khoshee Jha* and others.—Weekly Reporter Vol. XX, page 471.

An ascetic, a mere life-tenant, cannot alter the succession to an endowment belonging to ascetics, by an act of his own in connection with the *status* under which he originally acquired the trust.—*Mohunt Rumun Dass* v. *Mohunt Ashbul Dass.*—S. W. R. Vol. I, page 160.

According to Hindú law a *chelá* is the heir of a deceased *mohunt*, and as such entitled to a certificate to enable him to collect his debts.—*Mohunt Sheo-prokash Dass* v. *Mohunt Joyram Dass.*—S. W. R. Vol. V, Mis. p. 57.

Gopaul Dass, the reigning *mohunt* of the *Muth* or *Akhrá* (a religious endowed institution) in *Burdwan*, made a will appointing Ladly Dass, one of his disciples, to succeed him as *mohunt,* and to take possession of the real and personal estate belonging to the *Akhrá*, with a reservation that, when L. should find himself incapable of fulfilling the duties of the office, he should appoint one Gri-dharee Dass who was especially designated by him in L.'s place as *mohunt.*

L. was installed as *mohunt*, and took possession of the *Guddee* (or throne) and estates attached to the *akhrá ;* and was subsequently recognized and confirmed as superior by the assembly of *mohunts.* L., by his will, nominated Nund-kishore Dass, his successor, to the *mohuntship.* In a suit by G. against N. for a declaration of G.'s reversionary right to the *mohuntship* under the will of G. D., held :—

First, that according to the true construction of the will of G. D., there was no absolute gift to G. of the reversion upon L.'s death or incapacity to perform the duties of the office.

Secondly, that even in the event of L.'s becoming incapable to perform the duties of *mohunt*, the direction of the Testator, or Grantor, amounted at most to a precatory-trust, and was not imperative upon L.

Whether by usage there was any power in the *mohunt* to impose such a restriction upon his successor as to nominate a specified individual, *Quære?*

Held, further, that from the frame of the suit the plaintiff could only succeed by force of his own title, and not by the infirmity or illegality of the Defendant's title. *Gri-dharee Dass* Appellant, v. *Nund-kishore Dass mohunt.*—Privy Council, the 17th and 19th of July 1876. Moor. I. A. Vol. XI, p. 40

CASE No. 201 OF 1851.

MOHUNT MADHUBAN DASS, (Defendant,) Appellant,

versus

HARI-KRISHNA BHANJA, (Plaintiff,) Respondent.

A party having become a *byraghee*, but retained the style and title of *Rajah*, and mixed in the worldly affairs, and continued with his family, was held not to have become an ascetic, or religious devotee, to such an extent as to exclude his adopted son from succeeding to his property, whether acquired before or after his becoming a *byraghee*.

Judgment.

Messrs. Jackson and *Mytton.*—The Court has already ruled on the arguments heard on both sides that the fact of the adoption has been established, and that the legality of that adoption is not now open to question. It remains only to declare on the point last argued whether the fact of the deceased having become a *byraghee* is established; and whether the withdrawal from the world, and retirement from secular affairs and occupations, were such as to bar the succession of the adopted son, to the property acquired by the deceased subsequently to the period of his becoming an ascetic, and to constitute a right in his *chelá* or disciple to succeed to it in preference to the adopted son.

It seems from the authorities cited, that every person calling himself a *byraghee* does not thereby exclude the heirs from succession to his property subsequently acquired. To become a religious ascetic and exclude his heirs from succession to property subsequently acquired, he must *boná fide* retire from all worldly affairs,

and in fact become as it were dead to the world, leaving all the property then vested in him to the legal heirs who succeed to it at once. There seems to be no doubt that the deceased joined the sect of *byraghees*, and was elected a *mohunt* or superior of one of their monasteries; but he still retained the title and style of a *Rajah*, and used this title in his legal affairs. He carried on worldly affairs, and communicated with his family, and drew from Government a pension of Rs. 8,000 a year as *Rajah* in which capacity it was granted to him. A strong presumption arises that the property in question was part of, or acquired by the use of part of, that very pension, and not in the exercise of the functions of a *byraghee* or recluse. The deceased cannot, therefore, be considered to have become a religious recluse to such an extent as to exclude his legal heirs from succeeding to the property in question. The right of the legal heirs to succeed, therefore, is established, and no sufficient ground has been shown for setting aside the decision of the Lower Court. The decision is, therefore, affirmed, with costs of appeal against the appellant.—S. D. A. Decis. for 1852, p. 1089.

Admitted Legal Opinion.

The heirs of a founder have a common right to the use of a building relinquished by him for a place of worship: not so the heirs of a *purohit* or the spiritual preceptor of the founder.

Q. Balram Seta Dass, (a devotee,) had appropriated a building for religious worship, and had established in it an image of the deity. On his death, the plaintiff, who is the widow of the son of Prit-ram, his *purohit* or spiritual preceptor, preferred a claim to the temple in question; a son's son of the founder being then living. Under these circumstances, according to the Hindú law, is the claim of the plaintiff in virtue of the relinquishment or appropriation valid, or is the heir of the founder to be considered as owner of the temple?

R. The building, with the deity, was relinquished to the *purohit*, and not given to him; indeed, the founder having relinquished a building in which he had established an image of the deity, did in fact give that building to the deity; hence it belonged

to the deity solely: for the deity existing therein, it was impossibl to give it to another. By mere relinquishment, proprietary righ cannot be established; and, consequently, as the *purohit* himsel never possessed any proprietary right, none can possibly appertai to the widow of his son. The appropriation, which was an auspi cious act, is common to the heirs of the founder, in whom the righ of enjoyment is vested.

City of Moorshedabad.—*Lukhee Thakoorain*, v. *Kewul Punthe* and others.—Macn. H. L. Vol. II, Chap. I, Section vii, case 4.

CHAPTER IV.

RELATIVE TO CUSTOM OR USAGE.

The duty of a European Judge, who is under the obligation to administer Hindú Law, is not so much to inquire, whether a disputed doctrine is deducible from the earliest authorities, as to ascertain, whether it has been received by the particular school which governs the district with which he has to deal; and has there been sanctioned by usage. For, under the Hindú system of Law, clear proof of usage will outweigh the written text of the Law.—Part of the Privy Council's judgment in the case of the *Collector of Madura* v. *Mutu Rama-linga Sathupathy.—Vide* B. L. R. Vol. I, P. C. page 12.

In cases of inheritance according to the Hindú law, in order to legalize any deviation from the strict letter of the law, it is necessary that the usage authorizing such deviation should have been prevalent during a long succession of ancestors in the family, when it becomes known by the "*kuláchár,*" and has the prescriptive force of law. Where a usage is hereditarily and scrupulously adhered to, it acquires the appellation of a duty.—*Sumrun Singh* and others v. *Khedun Singh* and others.—Sel. S. D. A. R. Vol. II, page 116 (New Ed. p. 147).

Custom when it is ancient, invariable, and established by clear and positive proof, overrides the usual law of inheritance.—*Mussummat Kustoora Koomaree* v. *Monohur Deo; The Government* v. *Monohur Deo.*—S. W. R. for 1864, p. 39.

To establish a family custom at variance with the ordinary law of inheritance, it is necessary to show that the usage is ancient and has been invariable, and it should be established by clear and positive proof. A family custom as to intermarriages, being a matter of family history may be proved by declarations made by members of the family.—*Rajah Nugender Narain* v. *Raghoo Nauth Narain Dey.*—S. W. R. for 1864, p. 20.

According to Hindú Law, in order that a custom may have the force of law, it must be shown to have existed from time immemo-

rial.*—*Luchmun Lall* v. *Mohun Lall Bhayee Gayal.*—S. W. R. Vol. XVI, page 179.

It is of the essence of special usages modifying the ordinary law of succession that they should be ancient* and invariable, and that they should be established to be so by clear and unambiguous evidence.—*Rama-lakshmi Ammal* v. *Sivannutha Perumal Sethurayer.*—S. W. R. Vol. XVII, c. r. p. 553.

Where a custom was alleged in abrogation of the law of inheritance, and the prevalence of such custom was not clearly established by the evidence, the Pundits declared that both the custom and the law were equally valid; but in their opinion the disposition under the law was the best; and the Court decreed (chiefly) on a verbal report from the law officers, that the cast long tried to accommodate matters between the parties that the property in dispute should follow the law of inheritance.—*Gunga* v. *Jeeva.* Borr. Vol. I, p. 384, (Morl. Dig. Vol. I, p. 332.)

If an estate has not invariably devolved entire on the chief heir, but has been occasionally held by several heirs conjointly, the plea of family usage in bar of a partition cannot be maintained.—*Rajah Sooranany Venkatapetty Rao* v. *Rajah Sooranany Ram Chundera Rao.*—Case 1 of 1825. Mad. Decis. Vol. I, p. 495. (Morl. Dig. Vol. I, p. 333.)

Where a widow claimed a moiety of the estate of her late husband as his heir, the claim was dismissed on proof that he had succeeded to the whole estate (previous to the grant of the Dewany) under a custom by which it always devolved entire to one heir.—*Mussummat Mohamaya Debeah* v. *Gouree Kaunt Chowdhoory.*—Sel. S. D. A. R. Vol. I, p. 236 (New Ed. p. 316.)

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* "Although in this country we cannot go back to that period, which constitutes legal memory in England, *viz.*, the reign of Richard I, yet still there must be some limitation, without which a custom ought not to be held good. In regard to Calcutta, I should say that the Act of Parliament in 1773, which established this Supreme Court, is the period to which we must go back to found the existence of a valid custom, and that after that date, there can be no subsequent custom, nor any change made in the general laws of the Hindus, unless it be by some Regulations by the Governor-General in Council, which has been duly registered in this Court. In regard to the Mofussil, we ought to go back to 1793, prior to that, there was no registry of the Regulations, and the relics of them are extremely loose and uncertain."—*Extract from a Judgment of Sir Charles Grey, C. J.* See Clarke's Reports, pp. 113, 114.

A father cannot vary the law of divisibility so as to make a zemindary indivisible.—*Mootoo-vencata-chella Swamy Manyagar* v. *Munar Swamy Manyagar.*—Mad. S. R. 1853. *Vide* Norton's Leading Cases Part II, page 478.

The Privy Council have observed incidentally that, in their opinion, there does not exist in any persons the power of making laws of inheritance for themselves.—Part of Mad. H. C. R. Vol. III, page 58.

A custom which has not been judicially recognised cannot be permitted to prevail against the distinct authority.—*Narsammal* v. *Bala-ráma Charloo.*—Mad. H. C. Rep. Vol. I, page 420.

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*Ancient zemindaries are by custom indivisible.**

Partibility is the general rule of Hindu inheritance; the succession of one heir, as in the case of *ráj*, the exception.—*The East India Company* v. *Kamakshee Bai Sahibah.*—S. W. R. Vol. IV, P. C. page 42.

There is no rule of Hindu law relating to descent of all Hindu *Rajahs* and their estates; but in every case in which a departure from the ordinary law of succession and inheritance is relied on, a particular custom or *kuláchár* must be proved.—The Court of Wards on behalf of *Raj-coomar Sheoraj-nundun Singh* v. *Raj-coomar Deo-nundun Singh.*—S. W. R. Vol XVI, c. r. p. 143.

CALCUTTA S. D. A.—*The 17th of November* 1813.

Present:

H. Colebrooke and J. Stuart, *Judges.*

KOONWUR BODH SINGH and the heirs of JYE SREE SINGH *versus* SHEO-NATH SINGH.

The landed estate of a refractory zemindar being confiscated, it was conferred on a person in remuneration for his public services, and on his death it was held by his son,

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* *Vide* Norton's Leading Cases part 11, 478.

and afterwards by his grandson, to the exclusion of all other members of the family. On the suit of two sons of the original grantee to participate with their nephew, judgment was given against them, the zemindaree being one of those estates not liable to division, recognised by Regulation XI of 1793. Provision was made in that regulation for the future abolition of the custom, and it was enacted that, after the first of June 1794, such estates should descend according to the Muhammedan and Hindu laws of Inheritance. But this provision not held to be applicable to the present case, the father of the claimants having demised in the year 1774.

This was an action brought in the Zillah Court of Ram-ghur, by Jye Sree Singh and Koonwur Bodh Singh to recover from Rajah Muneeruth Singh two-thirds of the estate of Pergunnah Ram-ghur.

(The principal part of the decision which respected the law of inheritance and custom is as follows :)

With respect to the validity of the claim of the plaintiffs, according to the Hindu law of inheritance, the Court observed, that this point turned upon the further question, whether the estate in dispute was to be considered a common zemindary divisible by the laws of inheritance, or one of those estates which by the custom noticed in, and abolished by, Regulation XI of 1793, descended on one heir in exclusion of all the other members of the family. Adverting, however, to the extent and situation of the estate, to the zemindar possessing the title of the Rajah, to his maintaining a sort of feudal establishment of troops and dependant *jageer-dars*, the Court could entertain little doubt, that it was not a common estate divisible by the laws of inheritance. The decrees of the Zillah and Provincial Courts were accordingly affirmed by the Sudder Dewanny Adawlut, and the costs declared payable by the parties, respectively. Sel. S. D. A. R. Vol. II, page 92 (New Ed. pp. 116 & 122.)

CALCUTTA H. C.—*The 22nd of February* 1872.

The Hon'ble Sir Richard Couch, Kt., *Chief Justice*, and the Hon'ble A. G. Macpherson and F. A. Glover, *Judges.*

MAHA-RANEE HERA-NATH KOOER, (Defendant) Appellant,

versus

BABOO BURM NARAIN SINGH, (Plaintiff) Respondent.

Upon the authority of decided cases as well as the evidence of custom in the family, it was held that, the Raj or zemindary of Ram-ghur being an ancestral impartible

estate, and the family an undivided family governed by the *Mitákshará*, the plaintiff as eldest male heir was entitled to succeed to the dignity and estates of the family in preference to the mother of the late infant Rajah and widow of his father the last actual Rajah.

The Judgment of the Full Bench was delivered as follows by—

Couch, C. J.—This was a suit brought by Burm Narain Singh against the Assistant of the Court of Wards of Ram-ghur, and Maha-ranee Heera-nath Kooer, the wife of Maha-rajah Ram-nath Singh, deceased, to recover possession of certain estates and property mentioned in the plaint and therein stated in detail, which were claimed as appertaining to the zemindaree of Ram-ghur, the right to which, the plaintiff alleged, had accrued to him according to the family and country usage as the eldest male heir on the death of Triloke-nath Singh, the son of the second defendant. As the dispute is really with her, and the Court of Wards is only a formal party, we shall hereafter call her '*the defendant.*'

The zemindaree of Ram-ghur was acquired by Tej Singh, the common ancestor of the plaintiff, and the defendant's husband Ram-nath Singh. Tej Singh had three sons, Ram-nath being a descendant of his eldest son, and the plaintiff of his third son, and there being no male issue of the second. The defendant claimed the property, with the exception of a part called '*Guddee* Khurkhar' as heir to her son by Ram-nath, Triloke-nath Singh, who was born after the death of his father and died when four months old; and she claimed *Guddee* Khurkhar as having been purchased for her by her husband with her own private funds. The plaintiff's case was that the zemindaree of Ram-ghur was a *Raj* or principality which was impartible, and descended to him as the nearest male heir.

In A. D. 1772, the then Maha-rajah Mokoond Singh being found in arms against the British Government was conquered by it, and his estate was taken from him and granted by the Government to Tej Singh, a member of the family, but not in the direct line of descent. No *sunnud* has been produced; nor is it shown that any existed: but there are in evidence *pottahs* which were granted by the British Government successively to Tej Singh, and his son Purus-nath Singh, and on the 25th of March 1790 a settlement for ten years

was made with Muni-nath Singh, the eldest son of Purus-nath, who had three sons, and this was afterwards made perpetual.

The question at once arises, what was the nature of the estate granted to Tej Singh, whether it was a fresh grant of the family Raj with its customary rule of descent, or a grant of the lands, formerly included in that Raj, to be held as an ordinary zemindaree. To this the judgment in the Privy Council in Baboo Beer Pertab Sahee *vs.* Maha-rajah Rajendra Pertab Sahee, XII Moore's I. A., 1,* is closely applicable.

The ten years' settlement was made by the Government with the eldest son of Purus-nath Singh, there being other sons living, which would not have been right if it had been an ordinary zemindaree, the property of the undivided family.

But this is not all. Tej Singh who died in 1774, left three sons, as appears by the pedigree in the case: and on the 19th of April 1802, an action was brought in the Zillah Court of Ram-ghur by the two younger sons to recover from Muni-nath, the son of the eldest, two-thirds of the estate. Pending the suit Muni-nath died, and was succeeded by his son Sidh-nath.† The defence set up was that according to the custom of the mountainous country in which the estate was situate, and to the usage of the family, the estate was not divisible, but that on the death of the *Rajah* for the time being he was always succeeded in the *Raj* and zemindaree by the eldest son to the entire exclusion of the other branches of the family:—The Zillah Court gave judgment against the plaintiffs, and this being concurred in on appeal by the Provincial Court of Patna, they appealed to the Sudder Dewanny Adawlut. The case is reported in II Select Reports, 92, and the Court held that adverting to the extent and situation of the estate, to the zemindar possessing the title of Rajah, and to his maintaining a sort of feudal establishment of troops and *jageer-dars*, the Court could entertain little doubt that it was not a common estate divisible by the laws of inheritance. The decrees of the Zillah and Provincial Courts were accordingly affirmed.

We have no evidence in the case of the custom or usage of the family before the grant to Tej Singh: but the want of it is supplied

* IX. W. R. P. C. p. 15.

† See *ante*, pages 562, 563.

by this decision, which declared the estate to be impartible, the decision being pronounced in a suit between persons who are in privity with the plaintiff and defendant in this suit.

Having arrived at the fact that this is an impartible estate, we have to consider whether the defendant, a female, can succeed to it to the exclusion of the plaintiff who is the nearest male heir.

Where a family is governed, as this family was, by the law of the *Mitákshará* by which, in an undivided family, females do not inherit as long as there are any male members of the family, it is improbable that a custom that females should inherit to the exclusion of males would grow up with, and form part, of a custom that the eldest male member of the family should inherit. The object of the latter custom would be fully attained without the other, and there is no necessary connection between them. Before considering the evidence in this case, it will be convenient to refer to the decisions which are applicable to it. In a case in IV Select Reports, 57, the widows of Rajah Zorawur Singh sued his brother to recover possession of an estate in the Jungle Mehals, alleging that by the custom of the family, of the Pergunnah Jurria and of the other Jungle estates, the eldest son of the late incumbent took the whole estate, the other sons receiving lands for their support; and that in the event of the zemindar leaving no son, his widow took the estate to the exclusion of his brothers. A deed of gift by Zorawur Singh to the plaintiffs who were his second and third wives, was also set up. The Provincial Court of Calcutta, in which the suit was brought, put a question to the Pundit of the Court with directions to give an answer according to the *shaster* as current in the Western Provinces; and the answer was that the gift, if made, was not valid, and the right of inheritance in the estate vested on the death of the donor in his two brothers. The Provincial Court of Calcutta having dismissed the claim of the plaintiffs, they appealed to the Sudder Dewanny Adawlut. One of the Judges thereupon considering the whole case, held that the decision of the Provincial Court should be reversed; but the other two held it to be proved that the estate had always gone to the chief male heir, and confirmed the decision of the Provincial Court. In this case, the estate was ancestral and the family undivided, and the decision shows that the impartibility of the estate only interferes with

the ordinary law so far as to make it pass to the chief of the male heirs.

In Naragunty Lutchmee Davamah *vs.* Vengama Naidoo, 9 Moore's I. A., 66,* the estate which was the subject of the suit was a *polliam*, a tenure known in Madras. It was an ancestral estate of the nature of a Raj, not subject to partition, and could be held by only one member of the family who was styled the *polligar*, and it was held that, being ancestral estate, the succession vested in the nearest undivided male cousin of the *polligar* last seised, who died without male issue, in preference to his widow. It appears in the judgment, page 86, that this was the opinion of the Pundits who were consulted by the Sudder Court, and that it was adopted by the Court and no objection was urged to it on the appeal, the ground taken being that it was not an ancestral estate nor were the parties in their suit members of an undivided Hindu family. The answer of the Pundits, page 74, shows that the ground of their opinion was that all the members of an undivided family have a joint right in the ancestral property, although only one of them being capable, continues in possession thereof. Mr. Justice Markby referred to the Rajah of Shivagunga's case, 9 Moore's I. A., 539† as an instance of a woman succeeding to a Raj, and near the end of his judgment, said that between impartibility, and the exclusion of females, there is no connection whatever. That need not be disputed. It is not upon the impartibility of the estate, but upon the family being undivided and the law of succession to ancestral undivided property that the exclusion of females rests. This appears clearly in the Shivagunga and subsequent cases.

The zemindaree of Shivagunga was created in 1730 by the Nubab of the Carnatic and by a proclamation of Lord Clive, dated the 6th of July 1801, the Government transferred the zemindaree, which it appeared was treated as an escheat for want of lineal heirs, to Gonery Vallabha Taver, who was collaterally descended from the progenitors of the first zemindar. But the law applicable to it is stated in the judgment at page 589, where it is said that if the zemindar, at the time of his death and his nephews, were members of an undivided Hindú family, and the zemindaree, though im-

* 1 W. R., P. C., p. 30. † 2 W. R., P. C., p. 31.

partible, was part of the common family property, one of the nephews was entitled to succeed to it on the death of his uncle.*

Another authority for the exclusion of females, where the property is ancestral and the family undivided, is in the judgment of the Privy Council in Jowala Buksh *vs.* Dharum Singh, 10 Moore's I. A., 524, where it is said that Lall Singh, a nephew, whose legitimacy was disputed, if the legitimate male heir of the great ancestor would have taken the Raj on the death of his uncle to the exclusion of the widow, the property being assumed to be ancestral and the family undivided; that in the case of Katama Natchier *vs.* The Rajah of Shivagunga, it was admitted that this would have been the course of descent according to the *Mitákshará* if the property had been ancestral; and that the reason of that decision was that the Shivagunga Raj was the separate acquisition of the deceased. And in the judgment of the Privy Council in a later case, 13 Moore's I. A., 140, it is again said that in the Shivagunga case the impartible zemindary was shown conclusively to have been the separate acquisition of the person whose succession was the subject of dispute, and the ruling of the Court was, that in that case the zemindary should follow the course of succession as to separate property, although the family was undivided, but that if that zemindary had been shown to have been an ancestral zemindary, the judgment of the Board would, no doubt, have been the other way.

In a later case, we find their Lordships adhering to the law laid down in the earlier cases. In the judgment in Sree Rajah Yanmula Venkayamah *vs.* Sree Rajah Yanmula Boochi Venkondora delivered on the 2nd of February 1870,† the strength of the argument of the learned Counsel for the appellant has been directed to show that this case should be governed by that in the 9th volume of Moore's Indian Appeals, which is generally known as the Shivagunga case. They have gone so far as to argue that the estate in question in this case, being impartible, must from its very nature be taken to be separate estate, and consequently that, according to the decision in the Shivagunga case, the succession to it is determinable by the law which regulates the succession to a separate

* See *ante*, 443.

† 13 W. R. P. C., 21.

estate whether the family be divided or undivided. The authority invoked, however, affords no ground for this argument. The decision in the Shivagunga case will be found to proceed solely and expressly on the finding of the Court that the zemindary in question was proved to be the self-acquired and separate property of "Gonery Vallabha Taver." And, after quoting from the judgment, they say, —"It is therefore clear, that the mere impartibility of the estate is not sufficient to make the succession to it follow the course of succession of separate estate.

This judgment is closely applicable to the present case. There is here an ancestral impartible estate and an undivided family; for there is no proof that the family of Tej Singh had become divided, and no issue was raised as to that. If there had been no evidence of custom in the case, we should have held, upon the authority of the decisions we have referred to, that the plaintiff is entitled to succeed to the estate.

The evidence, oral and documentary, is fully stated in the judgment in the division Court, and it is not necessary to re-state it. It shows that on the only occasion since the grant of the estate to Tej Singh when a female might have inherited, she was excluded. It is true that in both cases a brother succeeded in preference to the widow of the deceased; but this could only be justified by the family being an undivided one; and the undivided family was not that of Sidh-nath Singh, the father of the brothers, but of Tej Singh, of which family the plaintiff is a member. The judgment of Mr. Justice Markby for the defendant appears to be founded on the assumption that the succession was governed generally by the rule of inheritance of separate property according to the Mitákshará, treating separate as if it were self-acquired, and this is supported by the judgment in the Tipperah case; but all the other authorities appear to show that this is not correct. Where the property is ancestral and the family undivided, a custom modifying the law, must be a custom to admit females, not a custom to exclude them. In our opinion the plaintiff is entitled to succeed to the estate.

Nothing is said in the judgment in the division Court about the Khurkhar property, and the judgment of the Lower Court as to that was confirmed, apparently, without any difference of opinion

between the learned Judges. It has not been argued before us that this part of the decree is erroneous.

We think the appeal should be dismissed with costs. The decree of the Lower Court will thus be allowed to stand.*—S. W. R. Vol. XVII, pp. 316, and 331—335.

PRIVY COUNCIL.—*The 14th of November* 1873.

THAKUR DURRYAO SINGH, Plaintiff,

versus

THAKUR DURI SINGH, Defendant.

[*On Appeal from the Court of the Financial Commissioner of Oudh.*]

A custom of impartibility must be strictly proved in order to control the operation of the ordinary Hindú Law of Succession. The fact that an estate has not been partitioned for six or seven generations does not deprive the members of the family to which it jointly belongs of their right to partition.

The appellant sued his elder brother, the respondent, in the Revenue Courts of Khyeabad for a partition of their Ancestral estate of Bonneamow. In three judgments, *viz.*, of the Assistant Settlement Officer, of the Commissioner of Khyeabad, and, in special appeal, of the Financial Commissioner of Oudh, the appellant was held entitled to a partition as a member of a joint Hindú family. On the 27th of August 1868, the Financial Commissioner, in review of his own judgment, reversed those three judgments, and held that the appellant was only entitled to receive suitable maintenance from the respondent.

By the facts as admitted, or as found in the first two Courts, it appeared that the talook in question had belonged for several generations to the family of the appellant and respondent. It had not been divided for six or seven generations, and the respondent pleaded a family custom against partition, which, however, he failed to establish by evidence.

* From this decision an appeal was preferred to the Privy Council, but *pendente lite*, the appellant, Moha-ranee Heera-nauth Coonwur having died, the appeal was dismissed by that Tribunal for want of prosecution.

In the judgment passed in review, the Financial Commissioner relied upon a case in which his predecessor Mr, Davies had decided that an unbroken prescription of six or seven generations is sufficient warrant for maintaining the family usage under which a talook had always descended to a nigh heir.

The appellant then appealed to her Majesty in Council.

The judgment of their Lordships was delivered by

Sir J. W. Colvile.—Their Lordships are of opinion that this appeal must be allowed. That the family was joint and undivided was indisputable; and it, therefore, lay on the respondent, if he could displace the operation of the ordinary Hindú law, to do so by clear proof of some family or other custom which varied the law. Both the lower Courts have found that no such custom was established; but that, on the contrary, there was evidence, satisfactory to them, that the estate, though engaged for in the name of one brother, was, in point of fact, held and enjoyed by the two brothers as co-sharers. There was also evidence that although there had been no partition of this estate for six or seven generations, the property of the family had in former times been the subject of partition.

It appears to their Lordships that the decision of Mr. Davies has not the effect which the Financial Commissioner, Colonel Barrow, attributes to it; and that it is not an authority which governs the present case. In the case before Mr. Davies, the lower Courts had found that during six or seven generations the estate, then in question, not only had remained undivided in fact, but had descended as an impartible estate to a single heir. That being so, Mr. Davies appears to have ruled that this proof was sufficient to raise a presumption of an unbroken family custom, which could not be rebutted by some evidence that had been tendered to show earlier partitions in the family, where by a larger estate had been broken up into several smaller portions, one of which was the estate in dispute. In the present case there was no evidence of enjoyment by a single member of the family during six or seven generations; all that was found was that during that period the estate had never been divided. That fact alone cannot control the operation of the ordinary rule of Hindú law, or deprive the parties, if members of a joint and undivided family, of the right to demand a partition when they are so minded.

Their Lordships will therefore humbly advise Her Majesty to allow this appeal to reverse the decision of the Financial Commissioner, and to affirm the decrees of the lower Courts.

Bengal Law Reports, Vol. XIII, p. 165,

In a suit against the son of the late Rajah of Tipperah for the succession to the Tipperah zamindari, there being proof that by the usage of the family, the person appointed *Jobraj* is successor to the zamindari, in preferance to the next of kin, such usage was upheld by the Court and Judgment given accordingly.—*Ramganga Deo* v. *Doorga Monee Jobraj.*—Sel. S. D. A. Rep. Vol. I, p. 270. (New Ed. p). I Morl. 333.

By the special usage of the Principal Zamindari in the district of Tipperah, the person appointed *Jobraj* takes the inheritance, in preference to the next of kin, and the person appointed *Burrah Thakoor* is considered next to him in succession, and takes the inheritance in his default, as well as on his death, provided the *Jobraj* after becoming *Rajah* has not nominated another person to be his *Jobraj.*—*Urjun Manik Thakoor* and others v. *Ram Gunga Deo.*—Sel. S. D. A. Rep. Vol. II, p. 139 (New Ed. p).

According to the custom prevalent in certain mountainous estates of Tipperah, the ordinary rules of inheritance do not prevail, and the individual of the family designated *Jobraj*, and failing him the individual called *Burra Thakoor* succeeds to the estate and title of Rajah.—*Ranee Soomitra* v. *Ramgunga Manik.*—Sel. D. A. Rep. Vol. III, p. 40 (New Ed. p. 54).

According to the Hindú law a Rajah has full power to nominate a *Jobraj* or heir apparent, and a whole or uterine brother has a better title than a half brother.—*Beer Chunder Joobraj* v. *Neel Kissen Thakoor.*—S. W. R. Vol. I, p. 177.

In a suit for succession to a Raj, the right to which was founded on family custom governing the succession, the plaintiff stated that he was the eldest living member of the class out of which the successor could alone be appointed, and that the predecessor of the last had promised to appoint him the plaintiff. The defendant contended that the choice of the Rajah within a certain class, within

which he was included, was absolutely free and could not be controlled by the wishes of a former Rajah.

Held that where there was evidence of a power of selection, the actual observance of seniority even in a considerable series of successions could not of itself defeat a custom which established the right of free choice, and that even if the instances had been uniform and without exception, that alone would not be sufficient to support the plaintiff's case.

Where the custom required the union of two things to constitute the legal heir, *viz.*, seniority in age and nearness of kin, a claimant who has but one of these qualifications (seniority) cannot be entitled to succeed by the family custom.

Held that the general rule of Hindú law, which gives a preference as heir to the whole blood over the half blood extends also to a Raj, in the absence of evidence showing that the family custom by which the succession to the rajdom is governed supersedes the General Law. Where a custom is proved to exist it supersedes the General Law, but the General Law still regulates all beyond the custom.—*Neel Kristo Deb Burmana* v. *Beer Chunder Thakoor* and others.—Privy Council, the 15th of March 1869.—S. W. R. Vol. XII, P. C. p. 21. *Vide* B. L. R. Vol. III, P. C. p. 13.

By the general Hindú law where a subject of inheritance is from its nature indivisible, and can therefore descend to one only of several sons, the succession as between sons by different wives (other than the first wife) of equal caste, is to be determined by the priority of birth of the sons, and not by the priority of marriage of their respective mothers; and therefore with respect to the succession to an impartible zamindaree in the district of Tinnevelly in the presidency of Madras, the son of the third wife is, in the absence of proof of any special customs or family usage to the country, to be preferred as heir to a subsequently born son of the second wife.*

A special usage modifying the ordinary law of succession must be ancient and invariable, and must be established to be so by clear and unambiguous evidence.—*Rama Lakshmi Ammal* v. *Sivanantha Perumal Sethurayer.*—Privy Council. B. L. R. Vol. XII, pp. 390—405.

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* See Partition.

The mere impartibility of an estate is not sufficient to make the succession to it follow the course of succession of separate estate. Shiva Gunga Case explained* the *Sree Rajah Yanumalu Venkujamah* v. *Sree Rajah Yanumalu Boochi Venkudra.*—S. W. R. Vol. XIII, P. C. p. 21.

There is no difference between the position of a Rajah holding an impartible *Raj* and that of an ordinary zemindar, in respect of his power to relinquish the property in favor of his next legal heir. Such a relinquishment is not forbidden by the Hindú law.

Where the effect of such a relinquishment is to give the property entirely to the hands of his son, he can, during his father's life-time, question and challenge any acts done, and any acts that are alleged to have been done, by his father, and which are denied by the father.—*Luchmee Narain Singh* v. *T. M. Gihon* and others. —S. W. R. Vol. XIV, p. 197.

Held that a Ghatwali Mahall in zillah Beerbhoom, with reference to the usual practice and the meaning and intent of the term *Ghatwal,* is not divisible, on the death of a *Ghatwal,* among his heirs, but should devolve entire on the eldest son, or the next *Ghatwal.*—*Har Lal Singh* v. *Jorawun Singh.*—Sel. S. D. A. R. Vol. VI, page 169. (New Ed. p. 204.)

MUSSAMAT TEETOO KOONWUREE, (Defendant,) Appellant,

versus

SURWAN SINGH, (Plaintiff,) Respondent.

Judgment.

The court observe that there is no doubt that the Principal Sudder Ameen has decided correctly, as it is well known that the established custom of the *Ghatwalls,* as of Hindú families in general is that the right of succession is in the eldest son and his descendants and representatives, and the pleader of appellant has not been able to show any speciality in this case to the contrary; there is therefore no necessity to enquire into the fact of Luchmun Sing's possession

* See *Ante* pp. 244, 443; and Partition.

after his father's death, such possession not having been of such duration as could in itself create any prescriptive title for his descendants, the defendant in this suit Bhola Sing the grandfather having died in 1830 Fuslee.

This appeal is dismissed with costs. Sudder decision 25th August 1853, page 765.

Agreeably to the family usage, the succession by primogeniture to an estate in Chota Nagpore (under the Agent to the Governor General at the Hazari Bagh) was upheld against a claim for division of the ancestral estate.—*Thakoorai Chutter Dhari Singh,* v. *Thakoorai Tiluck Dhari Singh.*—Sel. S. D. A. R. Vol. VI, page 260. (New Ed. p. 325).

By the usage of the zemindars of Pachete the eldest son was held entitled to succeed to the *Râj,* the other sons as well as the minor branches of the family being only entitled to maintenance. *Moharajah Gurur Narain Deo* v. *Anund Lal Singh.*—Sel. S. D. A. Rep. Vol. VI, p. 282. (New Ed. p. 354).

In the case of an estate in Manbhoom, in the jurisdiction of the Governor-General's Agent at Hazari Bagh, it was held according to the usage of the family that the succession vested in the eldest son of deceased Rajah born of any of his wives, in preference to the eldest son of his *paat* or first Rani.*—*Rajah Raghoonath Singh* v. *Rajah Hurrihur Singh.*—Sel. S. D. A. R. Vol. VII, p. 126. (New Ed. 146).

Where in a disputed claim for a zemindari in jungle mehauls, it appeared on the evidence that it was an estate that, by the family custom, had always been held by the chief male heir, the remaining heirs receiving only food and raiment, and that it never had been taken by a female, it was held that the brother of the deceased childless Rajah should take his estate to the exclusion of his widows.—*The widows of Rajah Zorawor Singh* v. *Koonwur Perthee Singh.*—Sel. S. D. A. R. Vol. IV, p. 57. (New Ed. p. 72).

In a suit for succession to a moiety of the estate of the *Raja* of Tirhut, the claim was dismissed on the ground that the succes-

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* See Partition.

sion devolved upon the defendant, in virtue of a deed executed in his favor by the late incumbent, such succession being in conformity with the long established usage of the family in which the title and estate had uniformly devolved entire for many generations.—*Maharaj Kunwar Basudev Singh* v. *Maha-raja Rudra Singh Bahadur.* S. D. A. R. Vol. VII, p. 228. (New Ed. p. 271).

It is no bar to the division amongst heirs of an estate, the property of a Hindú family, that it previously belonged to another family, in which the custom had obtained that the whole estate should pass to the eldest son.—*Gopal-das Sindh Man Datta Mahapatra* v. *Narottam Sindh* and others.—S. D. A. R. Vol. VI, p. 195.

Where a party sued to recover the *Raj* of one of the tributary mahalls of Cuttack, as the son and heir of the late possessor, his claim was dismissed on the ground that his mother being a kept mistress and never having resided in the *Mahåll Saráí,* he was not entitled to succeed, according to the local and family usage.—*Rajah Jenardun Ummar Singh Mahendar* v. *Obhoy Singh.*—Sel. S. D. A. R. Vol. VI, p. 42. (New Ed. p. 49).

The plaintiff sued to obtain possession of the *Raj* of one of the tributary *mahalls* in Cuttack as heir to the late Rajah, by a slave girl, held that he could not, as such, succeed to the *Raj* according to the established usage.—*Balbhudder Bhourbur* v. *Rajah Juggernath Sree Chundun Mohapattur.*—Sel. S. D. A. R. Vol. VI, p. 296. (New Ed. p. 372).

According to the Hindú law current in Benares, a childless widow is not entitled to succeed to her late husband's estate, which devolved entire and without partition on him from his ancestors, to the exclusion of his brothers.* *Rajah Shumshere Mull* v. *Ranee Delraj Konwur.*—Sel. S. D. A. Rep. Vol. II, p. 169. (New Ed. page 216).

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* The *pundits' Vyavasthá* upon which the above decision was found is as follows:—"The *Raj* and *zemindary* having descended entire and without partition to Rajah Ajeet Mull from his ancestors, his widow can maintain no right to possession of it during her life-time, because according to the *Shasters* current in Goruckpore, a widow is only entitled to the portion of the ancestral estate, which on a partition may have fallen to her husband.

Where by the usage of the country and family of the parties claiming certain prerogatives and property, it was customary that such should vest in the senior male of a particular branch of the family, it was held that a testamentary disposition in favor of any other member was void and of no effect.—*Moloshery Kowilagom Rana Vurma Rajah* v. *Mootherakal Rowilagom Rana Vurma Rajah.* Case 5 of 1825.—Mad. Decis. Vol. I, p. 509. (Morl. Dig. Vol. I, page 334.)

By the tenure of *Ghatwally,* the lands are held under a grant from the ruling power, by the peformance of the defined duty of the *Ghatwal* guarding the *Ghats* or passes.

Upon the death of the *Ghatwal* last seized, the lands descend entire to a male heir, as *Ghatwal.—Rajah Lilanund Singh,* Appellant, v. *The Government of Bengal,* Respondent.—Moore's India Appeals Vol. VI, p. 101.

Where it appeared on evidence that the estate of a Hindú deceased had not invariably devolved entire on the chief heirs, but had been taken by the most competent, and had been occasionally held by several heirs conjointly, the Court considered it to be divisible among the heirs according to the Hindú law of inheritance, and decreed partition of the estate in opposition to the claim of one heir to hold the same as an individual estate.—*Baboo Girwurdharee Singh* v. *Kolahul Singh* and others.—Sel. S. D. A. R. Vol. IV, p. 9. (New Ed. p. 12.)

This decision was confirmed on appeal by the Judicial Committee of the Privy Council.—*Vide* Moore's India Appeals Vol. II, page 344.

Where a nephew of a deceased Hindú claimed a moiety of his uncle's estate from his cousin, who had possessed himself of the whole property, he was non-suited, it being proved that the estate had always devolved on the eldest son or the nearest heirs of the deceased proprietor, his other heirs being only entitled to food and raiment from the estate.—*Mt. Moha-ranee* and another v. *Benee Persaud Rae.*—Sel. S. D. A. R. Vol. IV, p. 62. (New Ed. p. 79.)

Evidence of the acts of a single family repugnant or antagonistic to the general law will not establish a valid custom or usage

enforcible in a Court of Justice.—*Madhav-rao Rághavendra*, Appellant—*Bál-krishna Rághavendra et. al.* Respondents.—Bom. H. C. R. Vol. IV, p. 113.

Where a custom, according to which the Rajahs of Beerbhoom had granted a right to a share of property, described as "*Bhabak Mehals*," appeared to have been always recognised by the Courts, it was maintained notwithstanding that it is in contravention of the ordinary Hindú law.—*Nil Madhab Gossamee* v. *Chunder Mookhee Gossamee.*—S. W. R. Vol. XXII, p. 397.

By the custom of a Hindú family, no distinction was made between the issue of a *Sugyi* marriage and a *Lyahi* marriage. *Held* that the issue of the son of a Sugyi wife first married was entitled to inherit the property of the grandfather, in priority to the issue of the son of a subsequent Lyahi wife.—*Radaik Ghasiran* v. *Budaik Pershad Singh.*—Marshall's Reports, p. 614.

Among the Jumboo Brahmins, if a man die leaving a daughter and no male issue, the daughter and her daughter would inherit the property even where undivided, and not cousins or collateral relations, who could only succeed on failure of all other heirs; as it is the custom of the caste for women to succeed, whether the family be divided or undivided.—*Dessaees Hurree Shunkur* and *Roop Shunkur* v. *Man-koovur* and *Amba.*—Sel. Rep. 122. (Morl. Dig. Vol. I, p. 334.)

Where, by the established usage of any country or province, the right of succession may be preserved to illegitimate children as well as to those born in wedlock or adopted, such usage is to be adhered to.

It appearing that by the custom of Nagur Brahmins in Benares, illegitimate sons cannot inherit, judgment passed against the claimant, the illegitimate son of a Nagur Brahmin, suing for his father's estate.—Sel. S. D. A. R. Vol. I, p. 28. (New Ed. p. 37).

The plaintiff claims a moiety of the *Jelamuta Zemindaree* under the ordinary rules of the Hindú law of inheritance. The defendant pleads a family custom under which the landed property invariably descended to the eldest son, or, on failure of issue, to the

next male heirs in exclusion of all other heirs. As the defendant is unable to establish the existence of the alleged family custom, the decision of the lower court was reversed, and a decree given for the (plaintiff) appellant. Whenever a plea of family custom is set off against the ordinary law of inheritance, it is necessary that usage be ancient and invariable, and be established by clear and positive proof.—*Rajah Kunwar-naraen Roy, (Plaintiff,) Appellant* v. *Dharani-dhur Roy guardian for the minor sons of Krishnender-naraen Roy, (Defendant,) Respondent.*—S. D. A. Decis. for 1858, p. 1132.

In the case of *Sumrun Singh* and others v. *Khedun Singh* and *Hur-lal Singh,* the respondents pleaded the peculiar usage of their family, which, they averred, was sufficient to regulate the mode of succession: and they adduced two instances, in which the distribution had been made by the number of wives without any reference to the number of sons that they had borne respectively. The proceedings in this case were delivered to the *pandits* for an exposition of the Hindú law, and from their written opinion, it appeared that to legalize any deviation from the strict letter of the law, it was necessary that the usage should have been prevalent during a long succession of ancestors in the family, when it becomes known by the name of *kuláchár.* In support of these opinions the following texts of VRIHASPATI and KÁTYÁYANA were cited:—"Where there are an equal number of sons borne of two or more different wives, equal in degree, the distribution is to be regulated according to the mothers; but where the number of the sons (by different wives) is unequal, the distribution is to be regulated by the number of sons." "Where a usage is hereditarily and scrupulously adhered to, it acquires the appellation of duty; and must be adhered to." On receiving the above exposition of the law, the first and second Judges of the Sudder Dewanny Adawlut, who tried the appeal, being clearly of opinion that the plaintiffs had not proved such a usage as is required to justify a deviation from the Hindú law of inheritance, awarded them a two-anna share of the *Zemindaree* (in conformity with the Hindú law.)—Sel. S. D. A. Rep. Vol. II, pp. 116, 117. (New Ed. p. 147.)

A claim to an estate on the plea of family usage whereby a brother succeeds a brother to the prejudice of surviving sons dis-

allowed, on proof that such was not the family usage, but only in one instance the brother had seized on and maintained his title by violence.—*Pratáb-dev* v. *Sarb-dev Ráykat.*—S. D. A. Rep. Vol. II, p. 249. (New Ed. p. 321.)

SECTION II.

ON EMIGRATION.

CALCUTTA, S. D. A.—*The 22nd of June*, 1801.

RAJ CHUNDER NARAEN CHOWDHRY, Appellant,
versus
GOCUL CHAND GOH, Respondent.

Suit for the landed estate of a deceased Hindú, situated in Bengal, by the son of his sister, against the son of his paternal uncle. By the law of Bengal the plaintiff would be heir: by the law of Mithila, the defendant. As the estate was situated in Bengal, and the family, originally from Mithila, had resided for generations in Bengal; had intermarried with Bengal women; and had not uniformly observed the religious ordinances of Mithila; adjudged that the Bengal law must govern the case.

(The principal part of the decision is as follows:)

The (Sudder) Court put the following questions to their pundits. By the law as received in Bengal, which of the parties has a right to the contested zemindaree? and which according to the *Mithila* law? and if a Hindú of Mithila reside in Bengal, and regulate the religious ceremonies of his family, connected with funerals and marriages, by the *shaster* of Mithila; or if a Hindú of Mithila reside in Bengal, and regulate those ceremonies by the Bengal *shaster*; in each case, by which law will his civil rights be determined? The answer of the pundits recited that "if the family being from Mithila, but dwelling in Bengal, performed religious rites with the people of Bengal, and held a zemindaree in that province, *Gocul-chand* (the sister's son) is heir to it, conformably with the Bengal law. But if the family merely dwelt in Bengal, and performed religious ceremonies with *Mithila* people, and observed the laws and usages of that province, then Raj-chunder (the son of a paternal uncle) will inherit agreeably to the Mithila law." And from the evidence taken it appeared that the *purohit* or family-priest, of each of the parties, was a *Bráhman* of Bengal; that the ancestors of the parties, whose family had been resident in Bengal for several generations, had inter-married with Bengal

women; that the rites and ceremonies connected with funerals or marriages, had been some times according to the *Mithila*, and some times according to the Bengal *shástra*. Under the opinion given by their *pundits*, and on consideration that the contested lands were situated in Bengal; that the family had been long resident in Bengal; and that there had been no uniform observance of the ordinances of the *Mithila shástra*, the Sudder Dewanny Adawlut (present J. Lumsden and J. H. Harington) held that the case had been well determined by the provincial court according to the Hindú law of Bengal.*—Sel. S. D. A. R. Vol. I, p. 43. (New Ed. p. 56.)

CALCUTTA, S. D. A.—*The 24th of April*, 1812.

GUNGA-DUTT JHA, Appellant,
versus
SREE-NARAIN RAI and MUSSUMMAUT LEELLA-WUTTEE, (widow of Lullit-narain Rai), Respondents.

A person settling in a foreign district shall not be deprived of the benefit of the laws of his native district, provided he adhere to its customs and usages. According to the law, as current in Mithila, claimants to inheritance as far as the seventh and even the fourteenth in descent in the male line from a common ancestor, are preferable to the cousin by the mother's side of the deceased proprietor.

This was an action brought by Gunga-dutt Jha in the Zillah Court of Purnea on the 18th of January 1805, against Sree-narain Rai and Lullit-narain Rai, for the recovery of the estate, real and personal, of the late Rajah Inder-narain, vacated by the death of his widow, Ranee Inderawutty; the plaintiff claimed as heir to the estate of Rajah Inder-narain, the Ranee's husband, to whom he was maternal first cousin, *viz.*, son of the sister of Inder-narain's mother.

The defendants were lineally descended from Sumroo Chowdry, paternal great-grandfather of the great-grandsire of Rajah Inder-narain. The estate in dispute, the zemindary of Habelee Purnea,

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* If the family had been shown to have continued in the observance of the natural laws and usages, namely, those of *Mithila*, the rule of inheritance, as established in that province, must have been followed. By the disuse of them, the adoption of the customs and laws of Bengal, and employment of priests of this province in religious rites, the family is considered to have adopted Bengal for its country in all matters.—Note by Mr. Colebrooke.

is partly situated within the limits of the province of Bengal, and the late Rajah and Ranee, as well as the parties in this cause, were resident within that province; but all religious ceremonies, and those of a civil nature, including marriage, were performed in the families of both appellant and respondent (as they had been in the family of the late Rajah and Ranee, whose ancestors came into Purnea from the adjacent district of Mithila or Trihoot) by a Mithila *Purohit*, or priest, according to the *shasters* current in that district. On a reference by the Zillah Judge to the pundit of the Court, with the view of ascertaining the Hindú law in this case, he delivered the following *vyavasthá*:—"Inder-narain Rai died without leaving a son, grandson or great-grandson; his property came to his wife. There being no kinsman to her husband within the relation of brother's son, Sree-narain and Lullit-narain (defendants) are the *sapindas* (connected by funeral oblations) and succeed to his property. They surviving, Gunga-dutt Jha, the son of Inder-narain's mother's sister, who is among the *Bandhus* (cognates or maternal kindred,) does not succeed." *Vyavasthás* of several *pundits* in which the right of the plaintiff was upheld, having been exhibited by the plaintiff; the Zillah Judge transmitted the genealogical tables of the parties, together with the above *vyavasthás*, to the Provincial Court of Moorshedabad, and subsequently to the Court of Sudder Dewanny Adawlut, for the opinion of the Hindú law officers of those Courts. The *Vyavasthá* of the *pundit* of the Provincial Court of Moorshedabad was to the following effect:—"The widow of Rajah Inder-narain possessed her husband's estate. After her death, there survived the maternal first cousin of her husband, and the descendants of her husband's ancestor (in the 6th degree.) In this case, maternal first cousin is entitled to offer funeral oblations and recover the estate. The *Vyavasthá* of the *pundits* of the Sudder Dewanny Adawlut, in answer to the reference to the Zillah Judge, was to the following effect:—"After the death of Ranee Inderawutty, widow of Rajah Inder-narain, there being no descendant in the relation of brother's son; the *Vyavasthá* declaring the right of Sree-narain and Lullit-narain, the *sapindas* of her husband, to the estate left by the Rajah, and possessed by the Ranee, is correct, according to the *Bibada-chintamani*, and other books current in the district of Mithila. The *Vyavasthá* which declares

the right of Gunga-dutt Jha, son of the Rajah's maternal aunt, who is therefore a *Bundhu* (cognate) of the Ranee's husband, is not to be approved; that exposition of the law, however, is in conformity with the *Dáya-bhága*, *Dáya-tutwa* and other books current in Bengal."

The Zillah Judge, under the above opinion of the *pundits* of the Sudder Dewanny Adawlut, passed a decree, dismissing the plaintiff's suit, with costs.

On appeal to the Provincial Court of Moorshedabad, the first and second Judges of that Court having made another reference to the pundits of the Sudder Dewanny Adawlut, for a more specific detail of the grounds of their opinion in favor of the respondents, a *vyavasthá*, to the following purport, was delivered:—"That the parties being of a Mithila family, and performing their ceremonies according to Mithila *shasters*, the case ought to be decided according to the books current in that district: that, according to the received and most authoritative books of law of the Mithila system, which was current in Purnea also, the paternal kindred are entitled to succeed before the maternal relations, and that consequently the appellant had no legal right to the succession claimed by him." The Provincial Court, in conformity with the above *vyavasthá*, passed a decree affirming the decision of the Zillah Judge, and dismissing the appeal with costs.

A further appeal was preferred by Gunga-dutt Jha to the Court of Sudder Dewanny Adawlut. The Court (present J. H. Harington and J. Stuart), under the opinion of the Hindu law officers, and on reference to a former decision in the case of Raj Chunder *v.* Gocul Chand Goh,* passed on the 22nd of June 1801, (on which occasion it had been determined, that if a person of a Mithila family, living in Bengal, have a Mithila *Purohit*, and perform the ceremonies usual on occasions of joy and mourning, according to the Mithila *shaster*, his right of inheritance and other claims are determinable by the law authorities current in that country) were clearly of opinion, that the decision in the present case should be governed by those authorities; it having been clearly ascertained, that the usages of Mithila had continued to be practised in every respect by the parties. With a view, therefore, to ascertain the law as applicable

* *Ante*, page 581.

to the case, according to the best authorities of that system, reference was made to the Patna Provincial Court and to the Judge of Zillah Tirhoot, to obtain *Vyavasthás* from the *pundits* of those Courts.

In the replies to those references, many texts were cited to show, that, according to the Mithila authorities, the estate of a person, on failure of heirs within the relation of brother's son, devolves on the paternal kindred, who are *sapindas*, which relation includes the descendants of a paternal ancestor to the sixth degree, and ceases with the seventh person; in default of *sapindas* on the *samánodakas*, or those connected by a common libation of water, *viz.*, the more distant paternal kindred extending to the fourteenth degree, and on failure of *samánodakas*, to those termed *bandhus* or cognates. The appellant belonged to the latter description of relations. The Court of Sudder Dewanny Adawlut, under the above *Vyavasthás*, being of opinion, after a careful examination of the objections of the appellant, that the right of the respondents was preferable in law, according to the Mithila system, by which the decision of the present case was guided, passed a final decree, affirming the decisions of the Zillah and Provincial Courts, and dismissing the appeal, with costs.—Select Reports of the S. D. A. Vol. II, p. 11 (New Ed. p. 13.)

The above was, in appeal, affirmed by the Judicial Committee (of the Privy Council), the abstract of whose judgment is as follows:—

By the Hindú law in force in *Mithilá* or Tirhoot, the right of succession vests in the descendants in the paternal line in preference to those of the maternal line; and such law continues to regulate the succession of property in a family who have migrated from that district, but have retained the religious observances and ceremonies of *Mithila.*

A suit having been instituted to recover the estate of a Hindú *Mithalese* by the maternal first cousin of the last male proprietor, who claimed to be entitled according to the law in force in Bengal—Held by the Judicial Committee (affirming the judgment below) that according to all the authorities, the *shasters* of *Mithila* were to govern the succession, and that by them the party in possession being descended in the sixth degree in the paternal line was to be preferred to the maternal line: notwithstanding that part of the

property was locally situate in Bengal, and that the last proprietor was domiciled there.*—*Rutche-putty Dutt Jha* and others (sons, heirs, and legal representatives of Gunga Dutt Jah, deceased) Appellants *versus Rajender Narain Rae* (son and representative of Sree Narain Rae, deceased) Respondent.—Moore's India Appeals, Vol. II, p. 132.

The title to land in *Purnea*, being in dispute, upon the question, whether the *Mithila* or *Nuddea* Law was to regulate the succession, the test to be applied is, the form and character of religious rites and ceremonies, and the usages of the family.

Where, therefore, a family of *Bengali Soodra sutgops*, who had migrated, at a remote period, from (the district of *Burdwan*) the South-west of Bengal, where the *Nuddea* law prevailed, to the district of *Purnea*, where the *Mithila* law was in force, and adopted and performed their religious rites and ceremonies, according to the law of *Mithila*,—it was held by the Judicial Committee (of the Privy Council) affirming the decree of the Sudder Court, that the *Mithila* law, in such case, must govern the right of succession. *Rani Pudmavati* appellant and *Doolar Singh* and others Respondents.—Privy Council, Moore's India Appeals, Vol. IV, p. 259.

Upon a claim to the inheritance of a *zemindary*, situate in *Midnapore*, which had been held in possession, for a long period anterior to the institution of the suit, by the family of *sut-gop Brahmins*, who had migrated from *Bengal* to *Midnapore*, but had retained their laws and performed their religious ceremonies, according to the *Dáya-bhága* and other authorities in force in *Bengal*, it was held by the Judicial Committee (of the Privy Council) affirming the judgment of the Sudder Court, that the *Dáya-bhága Shástra* must govern the descent, and not the Mitàksharà, which prevailed in Midnapore.

A deed of gift of the zemindary to a stranger, by the widow of the zemindar, last seized, who died without issue, which gift was

* In the above decision, the opinion expressed by Mr. Harrington in the judgment appealed from was confirmed by the judicial committee, who, *inter alia*, said :—"Mr. Harrington, who considered the question, is of opinion that the rule of succession ought to be the *Mithila* law, according to which the parties have governed themselves, and he lays it down as a clear proposition of law, that in case where the family migrates from one territory to another, if they preserve their ancient religious ceremonies, they also preserve the law of succession. It appears to their Lordships, that the opinion expressed by Mr. Harrington is the law to govern this case."—2 Moor. I. A. pp. 166, 167.

made with confirmation of the *Bandhus*, the mother's brother's sons, the heirs: Held to be valid by the *Dáya-bhága Sashtra*, as against a party claiming the succession, according to the Mitákshará, as being descended in the seventh remove, in the male line, from the common ancestor.—*Rani Sreemutty Debia* v. *Rani Koond-luta.*—Moore's India Appeals, Vol. IV, p. 292.

A Hindú migrating from one province to another, and acquiring property in the territory where he settles, must be presumed, until the contrary be proved, to carry with him and retain all his religious ceremonies and customs, and consequently his law of succession; especially when the family is shown to have brought with it, its own priests, who and their descendants after them continued their ministrations down to the period of contest.* *Nobin Chunder Perdhan* (Defendant) Appellant *v. Junardun Misser* (Plaintiff) Respondent.* High Court, the 30th of December 1862. Sutherland's Weekly Reporter, containing Full Bench Rulings, Special number, page 67.

Where a family originally migrated from the *Mithila* province to the province of Bengal, the presumption is that they have preserved the religious rites and customs prescribed by the Mitákshará Law, unless the contrary be proved.—Koomud Chunder Roy (plaintiff) appellant *v.* Seeta-kant Roy and others (defendants) respondents. *Ibid.* page 75.

In the Rajah of Coorg's case, it was held that the succession to the property of a Hindú is governed by the laws, which regulate his religious rites, and not by the domicile of himself and his family. There the Rajah made his will and died in England, his family resided at Benares. The succession was governed by the *Mitákshará* which is the prevailing authority in Coorg.—Ind. Jur. for 1862-3, p. 109. II Nort. L. C. p. 474.

Hindú law is in the nature of a personal usage or custom, and probably migrating families or tribes would retain their own usages: the presumption is in favor of the continuance of the ancient family custom.—*Soorender Nath Roy* v. *Hiramony Burmoni.* Bengal law Reports. vol. I, P. C. p. 26.—S. W. R. Vol. X, P. C. p. 55.

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* The body of this decision, of which the above is the abstract, is given in the *Vyavasthá Darpana* (2nd Ed.) p. 336.

Hindú families are ordinarily governed by the law of their origin, not by that of their domicile. The presumption is in favor of the law of origin until the adoption of the law of a new domicile is proved.— *Lukkhee Dobea* v. *Gunga Gobind Dobey*.— Sutherland's Reports for 1864, p. 56,

The presumption is that all Hindú families migrating to any place retain their old rites, customs, and laws of succession, until the contrary is proved.—*Sonatun Misser* v. *Ruttun Mattab*. Sutherland's Reports for 1864, page 95.

Proof of the fact that in matters connected with succession, the law of the country of domicile has been adopted by a family, negatives any presumption arising from the observance of ancient customs in other matters.—*Chunder Sekher Roy* v. *Nubeen Soonder Roy*.—S. W. R. Vol. II, p. 197.

Hindú families are governed ordinarily by the law of their origin, and not by their domicile. In the case of a *Mitákshará* family residing in Bengal the presumption would be in favor of its being governed by the *Mitákshará* law, until proof were given of its having adopted the law of its new domicile.—*Pirthee Singh*. v. *Mussummat Shiva Soonderee* and the *Collector of Bhagulpore* on behalf of the Court of wards.—S. W. R. Vol. VIII, p. 261.

The presumption that a Hindú family emigrating in to Bengal from the N. W. Provinces, imports its own custom and law regulating the succession and the ceremonies of Hindú law in the family, may be rebutted by showing that except as regards marriage all other ceremonies are performed according to the law of the Bengal school and by Bengal priests.—*Ram Burun Pandah* v. *Kaminee Soonderee Dassee*.—S. W. R. vol. VI, p. 275.

The *Jains* are governed by the Hindú law of inheritance applicable in that part of the country in which the property is situate.—*Lallah Mohabeer Persad and others* v. *Mussummát Kundun Koonwar*.—S. W. R. vol. VIII, p. 116.* See *Bhagván Dás Tajmal* v. *Rajmal*, alias *Hirálál Lachiman-dás*.—Bom. H. C. Reports. vol. X, a. c. j. p. 241.

* See *ante*, page 232, and also page 436.

CHAPTER V.

SECTION 1.—ON MAINTENANCE.

PRIVY COUNCIL.—*The 28th of March* 1873.

RAJAH PIRTHEE SINGH (Defendant)
versus
RANI RAJ-KOOER *alias* RANI SHIB-COWAR (Plaintiff.)

[*On appeal from the High Court of Judicature North-Western Provinces.*]

A Hindu widow is not bound to reside in her deceased husband's family house; and she does not forfeit her right to maintenance out of her husband's estate by going to reside elsewhere unless she leaves her husband's house for the purpose of unchastity, or for any other improper purpose.—Arrears of maintenance may be awarded.

The judgment of their Lordships was delivered by

Sir B. Peacock:—This was a suit brought by Rani Raj-kooer against Rajah Pirthee Singh to recover arrears of maintenance, and also to have a decree for future maintenance. Rajah Pirthee Singh was the adopted son of Rajah Petumber Singh, and the plaintiff was the fourth or youngest of the four widows left by the late Rajah. The Subordinate Judge gave a decree in favor of the plaintiff, which was appealed to the High Court, who supported that decision and increased the amount of maintenance awarded by it. From that decision there is an appeal to Her Majesty in Council, which we now have to consider. The defence set up by the adopted son was that the plaintiff had been provided with maintenance so long as she lived with the family of her deceased husband, but that she had quitted his house for improper purposes. He says—"The defendant provided the plaintiff with maintenance so long as she remained in 'Ava' (that was the family house), according to the family custom. In 1861, the plaintiff, disregarding her husband's honor, left for Kotah with Bholanath, contrary to the terms of the will and the family custom, and became an abandoned character. This being so she has lost her right. Even after this the defendant, to avoid scandal and to oblige her, and relying on her promise that she would no more let Bholanath have any access to her, allowed her lodgings

at Durriya-pore, and regularly took care of her maintenance. The plaintiff's claim for maintenance prior to the institution of the suit is, therefore, illegal, and her claim for interest is also illegal, the payment of which was never stipulated. The plaintiff has nevertheless not parted with Bholanath, *i. e.*, she has continued to act and behave contrary to her promise, disregarding the honor and custom of the family, and has not left off her former bad habits. She has, therefore, no right under the Hindú law to have a maintenance fixed for her for the future." Now, that defence on the part of the defendant has not been proved, and has been very properly given up. The plaintiff alleged that some dispute arose between her and the elder widow with regard to her jewels which she did not make out; and she has not made out any cause for leaving the residence of her late husband any more than the defendant has made out his defence. The question, therefore, comes to this—whether a Hindu widow loses her right to maintenance by reason of her leaving her husband's house, provided she does not leave for the purposes of unchastity or for any other improper purpose.

Several cases have been cited upon this point, and it will be as well as to refer in the first instance to a case which was decided by the Privy Council, as that is one of the highest authority. That was a suit by *Cassi-nath Bysack* v. *Hurrosoondery Dassee** which was tried in the Supreme Court in Calcutta, in which the Chief Justice, Sir Edward Hyde East, gave judgment. The question was put to the pundits, whether a widow was deprived of her property upon the ground of her having left her deceased husband's residence. Sir Edward Hyde East says:—"Upon the last ground of error the pundits have uniformly answered that the widow was not bound to live with her husband's relatives. The eighth question put by the Court to their pundits was:—If a widow from a just cause cease to reside in the family of her husband, does she thereby forfeit her right of succession to her deceased husband's estate? A. "If a widow, from any other cause but for unchaste purposes, cease to reside in her husband's family, and take up her abode in the family of her parents, her right would not be forfeited." He certainly goes on to say:—"Here there was a good cause at the time, namely, the extreme youth

* 2 Morl. Dig., 198; and Morton's Rep., 85.

of the wife, and no pretence was made of the prohibited cause." It was alleged that, having left the residence of her deceased husband, and having refused to reside with the family, she did not forfeit the property which she had taken. That case was appealed to her Majesty in Council, and was decided on the 24th June 1826. The opinion of the Judicial Committee was delivered by Lord Gifford. He says:—"With respect to the last supposed ground of error in this decree which was assigned by the appellants, namely, that it was not ordered by either of the decrees that Hurro-soondery Dassee should reside with, or under the care, protection, and guardianship, of the appellants, who, as the surviving brothers of Bissonath Bysack, were alone entitled to have the care, protection, and guardianship of his widow, the *pundits* appeared to be unanimous in the opinion that a Hindú widow is not bound to live with her husband's relatives." That is the principle laid down. Then says his Lordship:—"I will read the answer to the eighth question put, which will explain what the Hindú law is upon the subject, and in that it appears the other *pundits* who were called in agreed, or at least they expressed no objection to the opinion pronounced. The question put is this:—'If a widow from a just cause ceases to reside in the family of her husband, does she thereby forfeit her right of succession to her deceased husband's estate?' The answer is:—'If a widow, from any other cause but unchaste purposes, ceases to reside in her husband's family and takes up her abode in the family of her parents, her rights would not be forfeited." Then his Lordship goes on to say:—"Now, it was not pretended in this case that she had removed from the protection of her husband's family for unchaste purposes. She was only of the age of fourteen years at the death of her husband. His brothers were young men, and she thought it more prudent and decorous to retire from their protection, and live with her mother and her family after the husband's death. Therefore it appears quite clear from the answers given by the *pundits* that she did not forfeit the right of succession to her husband's estate on account of removing from the brothers of her late husband; that they had no right to insist upon her not withdrawing from them in order to put herself under the protection of her mother; and, therefore, there appears to be no foundation to that extent for the appeal." The reasons given, that she was only of

("voluntarily," that is to say, without any cause except her own will and desire), and sued the defendants, who were the surviving sons and representatives of the other sons of Ram Mohun, for separate maintenance: a verbal reference had been made to three respectable Hindús, Kasinath Mullick, Gobinda Chunder Banerjee, and Ram Mohun Neoghi, who awarded Rs. 12 per month as sufficient allowance to her, she being allowed apartments in the family house, and food. Sir Lawrence Peel said:—"We think she is entitled to a separate maintenance. The words 'food and raiment' being too vague and ambiguous an expression, we must refer it to the Master to inquire and report whether the amount offered was just and proper with reference to her situation in life." Then in another case:—"Srimati Mandodari Dabi, the eldest of the two widows of Tilakram Pakrasi, a Hindú native of Bengal, I believe it was not made a question about her having left the (husband's) father's house, but in that case arrears of maintenance were awarded to her and future maintenance secured.

There was also the case of Jadu-mani Dasi *v.* Kheter Mohun Sheal* in which Sir Lawrence Peel, having considered the whole question, laid down the law in a clear and explicit manner. Every one who is acquainted with Sir Lawrence Peel must have the highest respect for his opinion upon all questions of this kind. He delivered the judgment of the Court. He said:—"The question is, whether a Hindú childless widow, who, some short time after the death of her husband, uncompelled by cruelty or ill usage, left the house of the family of her deceased husband, to dwell at first in the house of her own father, and subsequently with her aunt, living with her own relations, the residence being in all respects a proper one, and her conduct unimpeached, forfeits her right of maintenance out of the property which was that of her deceased husband in his lifetime and which had devolved on his heirs." There, the question was whether the principle which had been laid down in the case cited from the Privy Council, which was applicable to property inherited by a widow from her deceased husband, was applicable to a case of maintenance. Sir Lawrence Peel, after referring to some conflicting authorities, said:—"This state of the authorities has induced us to examine closely into the law on the subject. We

* *Vyavasthá Darpana,* (2nd Ed.) p. 384.

should not hesitate to follow the decisions of the Sudder in preference to those of our own Court, if they appeared to us to be at once more just and more conformable to the Hindú law. We have intended to follow the Privy Council. The Privy Council has, on the subject of the right of the Hindú widow to return to the home of her parents, laid down a broad rule, upon which it is not desirable to infringe. That Court says:—"It was not pretended that she had withdrawn herself for unchaste purposes. She was only fourteen at the death of her husband, his brothers were young men; and she thought it more prudent and decorous to retire from their protection and live with her mother and her family after the husband's death, therefore it appears quite clear from the answers given by the *pundits*, that she did not forfeit the right of succession to the husband's estate on account of removing from the brothers of her late husband; that they had no right to insist on her not withdrawing herself from them, in order to put herself under her mother's protection." The decisions of that Court must of course give the law to all Courts here. The answer of the *pundits* which the Privy Council adopts, is, that 'if a widow, from any other cause but unchaste purposes, ceased to reside in her husband's family and took up her abode in her parents' family, her rights are not forfeited.'" Then he says:—"In the Privy Council the question was whether the Hindú heiress forfeited her estate, by selecting without impropriety her father's roof for her residence. But it is to be observed that the opinion of the *pundits* was generally expressed as to forfeiture of rights, and the Court expressed in general terms that the widow had a right under the circumstances to select that residence, and could not be compelled to reside under the roof of her husband's family. This freedom of choice had respect to causes as applicable to a widow not an heiress, as to one who inherited;" meaning to say, that the rule which had been laid down was equally applicable to a case of maintenance as it was to the case of property which the widow had inherited; that is to say, that she was entitled to a freedom of choice, and that unless she left the residence of her deceased husband for unchaste purposes, she could not be deprived either of the property which she had inherited from him, or be deprived of maintenance which the Hindú law requires the heirs of her husband to provide for her.

We are, therefore, not now deciding the question for the first time. We are not now for the first time laying down a rule upon this subject. In the case of *Shurno Moye Dossee* v. *Gopal Lall Doss*,* the widow sued for maintenance, and it was held that she was entitled to that maintenance notwithstanding she had left the residence of her deceased husband. The Court said,—" In this case a widow sues for maintenance. The defendant, who is her step-son, objects that she resides in the house of her father, and alleges that she is, therefore, not entitled to maintenance. The widow alleges that she left the family home because she was tortured or rendered uncomfortable, but did not prove that allegation. We find, however, that it is laid down in the *Vyavasthá Darpana* of Shamachurn Sircar, the learned interpreter of the late Supreme Court, vol. I, p. 319, s. 160, that 'should a woman without unchaste purposes quit the family house, and live with her parents or own relations, yet still she is entitled to maintenance;' and in s. 161, 'The widow, however, is not entitled to maintenance by residing elsewhere without a cause, if she was directed by her husband to be maintained in the family home.' We think, therefore, that the widow is entitled to retain the decree for maintenance which she has obtained, and dismiss the appeal."

In this case their Lordships are of opinion that there was no direction by the husband's will which rendered it necessary for the widow to reside in her husband's house. The case of a widow is very different from the case of a wife. A wife of course cannot leave her husband's house when she chooses, and require him to provide maintenance for her elsewhere; but the case of a widow is different. All that is required of her is that she is not to leave her husband's house for improper or unchaste purposes, and she is entitled to retain her maintenance, unless she is guilty of unchastity, or other disreputable practices, after she leaves that residence.

The case was tried by a Subordinate Judge, in the first instance, who was a Hindú, and, therefore, must be acquainted with the habits, usages, and religion of Hindús; and he thought that the widow having left the husband's house, was still entitled to her maintenance, and he awarded her the sum of Rs. 150 a month, with a sum of money calculated at that rate for the years during which

† Marshall's Reports p. 497.

of maintenance receivable by her from her husband's heirs, with reference to the circumstances of the family.

This was a case brought in the Patna Court of Appeal by the Appellant, formerly plaintiff (after having established her pauperism), for the sum of 1,46,075 Rupees in ready money, jewels and other property, on the 4th of November 1815, against the Respondent, formerly defendant. It was set forth in the plaint, that the husband of the plaintiff (Durgahee Naik) and the defendant, his brother, after the decease of their elder brother Nomee Naik and Ruggoo Naik their father, carried on jointly a trade in various commodities. That by virtue of the deed of partition the sum claimed is due to the plaintiff as her husband's share of the property.

On the 15th of February 1819, the case came before the Acting Judge of the Patna Court, and the claim was dismissed on the following grounds. That the plaintiff, although time and opportunity had been allowed her, had not filed the deed of partition mentioned in her plaint, that in a former suit instituted by her she had not mentioned that deed, which might therefore fairly he presumed not to have been in existence; that the claim of the plaintiff was therefore not established, and that she was only entitled to receive a sum sufficient for her maintenance. The defendant was directed to pay her for that purpose in future the sum of twenty Rupees *per mensem* from the 1st February 1819; and in consideration of all the circumstances of the case the parties were made to pay their own costs respectively.

The plaintiff appealed *in formâ pauperis* from this decision to the Court of Sudder Dewanny Adawlut. On the 28th of September 1820, the case was brought forward before the Senior Judge (Sir E. Colebrooke and the fourth Judge S. T. Goad) of that Court. After reading the papers it was thought necessary to institute a more minute investigation into the truth, or otherwise, of the statement made by the appellant in the petition setting forth the grounds of appeal, especially as to the validity or otherwise of the deed of partition filed by her. An order was therefore passed that a copy of the petition of the appellant, setting forth the grounds of appeal and the original deed of partition filed on the 31st July 1820, should be sent, together with the other papers of the cause, to the Judges of the Patna Provincial Court.

On a final return being made by the Provincial Court on the 3rd of March 1823, the case was brought to a hearing before the then Chief and Fourth Judges (W. Leycester and W. Dorin). After the case had been gone through, an order was sent to the *pundits* of the Court to deliver within one week an answer to the following questions:—If a Hindú inhabitant of Zillah Tirhoot, who carried on trade jointly and lived together with his brother, died leaving a wife but no children, and if the wife be heir to none of the joint properties, movable or immovable, is she entitled to receive a sum sufficient for her maintenance; if she is entitled to receive it, whether the amount of it is to be settled by judicial authority or in what manner, and what ought to be the rule in such cases as prescribed by the Hindú law?

The reply of the *pundits* was to the following effect:—"If a Hindú, inhabitant of Tirhoot, who lived and carried on trade with his brother, die, leaving a wife, but no children, and if his wife does not acquire by inheritance his property, movable or immovable, she is entitled to receive a sum sufficient for her maintenance, because the wives of those who die without a division having taken place of the property, which they may have possessed jointly with others, are by the Hindú law entitled to receive a maintenance, and the heirs of the deceased are in the first instance to decide upon the sum they shall give for that purpose; but if it should appear that they neglect to assign a reasonable maintenance, the Judge is at liberty to award a certain sum sufficient for that purpose, with reference to the usage of the family and their circumstances in life," and to cause it to be paid her from the property of the deceased. It appeared to the sitting Judges that the validity of the deed of partition was not proved from the further evidence, nor the amount of the property established as set forth by the appellant; and that there was no reason for setting aside the judgment of the Provincial Court of the 15th of February 1819. A final decision was therefore passed affirming that judgment, and dismissing the appeal of the appellant, providing, however, that the respondent should pay to her the sum of 20 rupees *per mensem*, as awarded by the Provincial Court for her maintenance. The costs of the Court were made payable by the appellant, as well as the sum paid by the respondent as costs in the Provincial Court, to be levied from any pro-

perty which the appellant might be proved to possess over and above the sum of 20 rupees *per mensem* assigned her by the Court for her maintenance.—Sel. S. D. A. Rep. Vol. III, p. 223 (New Ed. p. 298.)

A Hindú widow's maintenance is a charge upon the family estate in whosesoever hands the estate may fall.—*Mussummat Khukroo Misrain* v. *Jhoomuk Lall Doss.*—S. W. R. Vol. XV, page 263.

The heir who takes and becomes possessed of the estate of the deceased must be held to continue to be primarily responsible both in person and property, for the maintenance of the widow, even though he should have fraudulently transferred that estate, or otherwise have improperly wasted it, and the widow is bound to look to the heir for her maintenance and to claim it from him primarily rather than from the estate transferred or wasted, which may nevertheless be in the last resort answerable to her claim.—*Ram Churn Tewaree* v. *Mussummat Jusoda Koonwer.*—Agra H. C. Rep. Vol. II, a. c. page 134.

The widow of an undivided Hindú who leaves a co-parcener him surviving, has, like the widow of a divided Hindú who leaves male issue, merely a right to maintenance, where, therefore, a widow sued for a *Palaiyaputtu* as heir to the surviving brother of her husband: *Held,* that the suit must be dismissed.—*Peddamuthe Viramani* v. *Apper Rau* and others.—Mad. H. C. Rep. Vol. II, page 117.

Where maintenance of a Hindú widow was not made by her deceased husband dependent upon her living with his family, she is entitled to it, notwithstanding she leave the house of his family and go to that of her father.—*Surun-moyee Dassee* v. *Gopal Lall Dass.*—Marshall's Reports, page 497.

A Hindú widow's right to maintenance does not cease on her leaving her husband's house.—*Sree-ram Bhuttacharjee* v. *Puddomookhee Debea.*—S. W. R. Vol. IX, p. 152.

The High Court remanded the case for the determination of issues regarding the circumstances of a widow who claimed maintenance from her husband's father.

Semble.—Separation from her husband's family does not deprive a Hindú widow of her right to claim maintenance from them, if she happens to be in needy circumstances.—*Chundra-bhága Bai* v. *Káshi-náth Vithal.*—Bom. H. C. Rep. Vol. II, p. 322.

A Hindú widow, who for no improper purpose leaves her husband's family, does not thereby forfeit her right to maintenance.—*Ahollya-bai Debea* v. *Lukkhimunee Debea.*—S. W. R. Vol. VI, page 37.

Under the Hindú law, mere unkindness short of cruelty would not be sufficient justification for a wife in leaving her husband's house.

Reference being had to the first Code of Criminal Procedure (XXV of 1861) and to the existing Code X of 1872, Section 536, unless a husband refuses to maintain his wife in his house, and has been guilty of acts of cruelty, which would justify her in leaving his protection, she is not entitled to maintenance while living apart from her husband.—*Sita-nath Mookerjee* v. *Srimutty Hoimabutty Debea.*—S. W. R. Vol. XXIV, p. 377.

Where a Hindú wife had left her husband's house, and carried on an independent calling, and the husband did not object to the calling or give her notice to return, Held that as she was desirous of returning, and the husband declined to maintain her, she was entitled to maintenance.—*Nity Laha* v. *Soondery Dassee*—S. W. R. Vol. IX, p. 475.

CALCUTTA, H. C.—*The 20th January* 1876.

Present:

The Hon'ble F. A. Glover, and ROMESH CHUNDER MITTER, *Judges.*

Special Appeal from a decision passed by the Judge of Cuttack.

BABOO GOLUCK CHUNDER BOSE (Defendant) Appellant,

versus

RANEE OHILLA DAYEE (Plaintiff) Respondent.

Under the Hindú law, property purchased from the heir with notice that a widow is entitled to be maintained out of it, continues while in the hands of the purchaser to be charged with that maintenance.

Before following properties from which she is entitled to obtain her maintenance in the hands of the purchaser, a Hindú widow is not bound in all cases to attempt to recover her maintenance from the heir-at-law.

Mitter, J.—We do not think it necessary to call upon the other side in this case. Three points have been raised in Special Appeal.—

First.—That the claim of maintenance should not have been held as a charge upon the estate in the hands of the defendant.

Second.—That the plaintiff should not have been allowed to recover a decree against the defendant without first having recourse to a suit against the heir.

Third.—That the debts on account of which the family property was sold and purchased by the defendant, being debts which were binding upon the family, the plaintiff has no right to charge her maintenance upon that property in the hands of the purchaser.

As regards the first question, it is not necessary for us to decide whether in all cases under the Hindú Law, maintenance is to be deemed as a charge upon property in the possession of a subsequent assignee from the heir. It has been settled by more than one decision of this Court, that where a purchaser purchases property from the heir with notice that a Hindú widow is entitled to be maintained out of it, the property in the hands of the purchaser continues to be charged with that maintenance. In this case both Courts have found the fact that the defendant, before he purchased the property, did receive such notice. That being so, we think that the Lower Courts are right in making the property in the hands of the defendant liable for maintenance of the plaintiff.

As regards the second question that has been argued before us, it seems to me that it is not a correct proposition of Hindú Law to say, that in all cases, a Hindú widow is not entitled to follow properties from which she is entitled to obtain her maintenance in the hands of the purchaser, unless she at first attempts to recover her maintenance from the heir-at-law. It may be that in certain cases where the defence is that sufficient property is still in the hand of the heir-at-law from which the maintenance can be recovered, the person entitled to maintenance might not be allowed to recover it from the purchaser of a small portion of the family property without first attempting to recover it from the properties in the possession of

the heir-at-law. But in this case there was no such defence, and, in either of the Courts below, the objection in this form was not raised. And we do not think that we ought to allow it to be raised here for the first time in special appeal.

The same remarks will apply to the third ground of special appeal which has been argued before us; that was never raised in either of the Courts below; and we do not think that we ought to allow it to be raised for the first time in special appeal.

Upon these grounds we think that the special appeal ought to be dismissed with costs.

Glover, J.—I concur.—S. W. R. Vol. XXV, p. 100.

A Hindú widow's claim to maintenance upon an estate does not necessarily render the sale of the property, subversive of her right; for even if there be no other property out of which that maintenance can be derived, there is nothing to prevent her from suing to establish her right to make her maintenance a charge upon the property sold.—*Anund-moyee Goopta* v. *Gopal-chunder Banerjea.*—S. W. R. for 1864, p. 310.

Held that the Hindú widow's right to maintenance being a charge on the property forming her deceased husband's estate, remains claimable out of the property, notwithstanding its alienation by the heirs, unless she bargains to forego it.—*Heera Lall* v. *Mussummat Kousillah.*—Agra H. C. Rep. Vol. I, p. 42.

CALCUTTA H. C.—*The 14th of December* 1866.

Present:

The Hon'ble H. V. Bayley and Shumbhoo-nath Pundit, *Judges.*

BHUGWAN-CHUNDER BOSE and others (Defendants) Appellants,

versus

BINDOO BASHINEE DASSEE (Plaintiff) Respondent.

A Small Cause Court has jurisdiction only as regards arrears of fixed maintenance, but not to determine the right to receive it.

On what principle maintenance for a Hindú widow should be awarded.

Shumbhoo-nath Pundit, J.—On the case coming up for trial, the respondent took objection regarding jurisdiction, but we hold that the Small Cause Court could have jurisdiction only as regards arrears of fixed maintenance, and not for determination of the right to receive it.

We have great doubts regarding the legal liability of the special appellant, the brother of the deceased husband of the plaintiff, to support her. At least he may be liable to maintain her in case of his having obtained from his father any property yielding him an income. In that case also, the amount of the maintenance can be fixed with reference to the amount of this income, and not solely on the necessities of the plaintiff. It is also to be kept in mind that, in case of the income of the special appellant from ancestral property, or in case of his personal liability, his personal property being small, the Lower Appellate Court will have to consider that the special appellant may find it more convenient to maintain the plaintiff in his house than if she were to live separate. The reasons given by the Lower Appellate Court to decree two annas per day appearing incorrect, inasmuch as they are not in accordance with the above principle, we remand the case to the Lower Appellate Court to retry the whole case, with reference to the above remarks, and to fix an amount suitable to the income of the special appellant.—S. W. R. Vol. VI, p. 286.

It is not necessary that a Hindú widow should be maintained in the same state in which her husband would maintain her.—*Kalee-persaud Singh* v. *Koopoor Konwaree.*—S. W. R. Vol. IV, p. 65.

The question of the adequacy of maintenance granted to widows and daughters depend on each case on its own peculiar circumstances.—*Dino-bundhoo Chowdry* v. *Rajmohinee Chowdry.*—S. W. R. Vol. XV, c. r. p. 73.

CALCUTTA, H. C.—*The 8th of September* 1875.

Present:

The Hon'le W. Markby, *Judge*.

NOBO GOPAL ROY (Defendant) Appellant,

versus

SREEMUTTY AMRIT MOYEE DASSEE, (Plaintiff,) Respondent.

A Civil Court has power to fix the rate of maintenance payable by a husband to his wife, where she, for lawful cause, is residing apart from him, and to make an order that maintenance at that rate shall be paid in future, subject to be set aside or modified according to circumstances.

I think that the plaint did ask that the maintenance to be paid to the wife should be fixed not only for the period which had already elapsed, but for the future.

I also think that the Civil Court has power to fix the rate of maintenance payable by the husband to his wife in cases where she, for lawful cause, is residing apart from him, and also power to make an order that maintenance at that rate should be paid in future.

But I think it equally clear that, that order must be subject to any modification which future circumstances may render necessary, and that, under some circumstances, the maintenance might be withdrawn altogether. I am rather disposed to think that that is so without any special directions contained in the order. I am inclined to think that if it could be shown that the wife had been guilty of such misconduct as would disentitle her to maintenance, or that, under the changed condition of circumstances, she could be called upon to return to her husband's house, or that the rate of allowance should be changed, the Court would have power in all such similar cases either to set aside or to modify the order as circumstances might require.

The decree will therefore be modified in accordance with this view.—S. W. R. Vol. XXIV, p. 428.

A woman divorced for adultery who had continued in adultery during her husband's life, and in unchastity after his death, is not entitled to maintenance out of the property of her deceased husband

according to Hindú law,—*Muttammal* v. *Kamakshee Ammal.*—Mad. H. C. R. Vol. II, p. 337.

A Hindú adultress living apart from her husband can not recover maintenance from him so long as the adultery is uncondoned.—*Ilata Shavatri* v. *Ilata Náráyan Nambudiri.*—Mad. H. C. R. Vol. I, a. c. p. 372.

A daughter living apart from her father for no sufficient cause cannot sue him for maintenance. *Ilata Shavatri* and another *versus Ilata Náráyan Nambudiri.*—Mad. H. C. R. Vol. I, p. 372.

According to Hindú law a son's widow is entitled to maintenance so long as she leads a chaste life, whether she elects to live with her father-in-law or with her own relations.—*Khoodee-monee Debea* v. *Tara Chand Chukerbutty.*—S. W. R. Vol. II, p. 134.

A Hindú father and son lived joint in food and worship, but separate in estate.—Held that the widow of the son has no legal claim upon the father for maintenance.—*Rujjo-money* v. *Shib Chunder Mullick.*—Hyde's Rep. Vol. II, p. 103.

On a division of an estate, the Hindú law recognizes the right of a grand-mother to maintenance, but not her title to any share of the estate.*—*Puddo-mookee Dassee* v. *Raee-monee Dassee.*—S. W. R. Vol. XII, p. 409.

A Hindú died leaving a widow and an adopted son, who continued after his death, to reside in the same dwelling-house in which they had resided with the deceased during his life-time, and which formed a portion of his estate. The son being an infant, the widow had the management of the house, and let a portion of it to tenants at a monthly rent. Subsequently the son sold the house, as his property by inheritance, to a stranger, who gave the widow and tenant a week's notice to quit.—*Held* that the son, even if he had attained his majority, could not evict the widow, or authorize the purchaser to do so, without providing some other suitable dwelling for her; nor in any case could the tenant be turned out without a month's notice.

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* See, however, Partition.

maintenance can be a charge upon an impartible zemindary, or, if not, out of what property or fund, if any, the son was entitled to be paid.—*Muthu-swamy Jagivira Yettappa Naiken* v. *Vencuta-swara Yettappa,* 2 B. L. Re. P. C., 15.—S. W. R. Vol. II, p. 684.

Plaintiff sued his elder brother for maintenance, calculated at Rs. 300 per month. The first Court gave a decree for Rs. 50 per month, which was reversed on appeal by the Judge, on the ground that he could recover no smaller amount than that claimed in his plaint. Held, in special appeal, that plaintiff had a right to a finding by the Judge as to what amount and what kind of maintenance he was entitled to receive from defendant.—*Neeladree Singh* v. *Rajah Rughoo-nath Singh.*—S. W. R. Vol. XVII, c. r. p. 411.

No rule of Hindú law precludes the recovery of arrears of maintenance. The only bar to the enforcement of a purely legal right is the lapse of the time required by the law of limitation to bar the remedy.—*Venkopadhyaya* v. *Kavari Hengusu.*—Mad. H. C. Rep. Vol. II, p. 36.

A right to maintenance bequeathed to a person is not affected by private arrangement entered into by the members of the testator's family, who are liable to pay the maintenance as a charge on the testator's estate.

A plaintiff, however, who has resided, and been supported by the family for twelve years after the testator's death without claiming the maintenance bequeathed to her, is presumed to have waived her right.—*Ram Lall Mookerjea* v. *Mussummat Tara Soondery Dabea.*—S. W. R. for 1864, p. 3.

A Hindú widow cannot alienate for any purpose property entrusted to her solely that from its profits she may maintain herself.—*Seith Gobind Dass* v. *Ranchora.*—N. W. R. Vol. III, p. 324.

A Hindú widow's right to maintenance out of lands which belonged to her husband and have devolved on her son, is a purely personal right, which cannot be sold in execution of a decree or otherwise transferred.—*Bhyrub Chunder Ghose* v. *Nubo Chunder Guho.*—S. W. R. Vol. V, p. 111.

There is no rule of Hindú law which recognizes authority in a widow entitled only to maintenance to make contracts for necessary supplies binding upon the heir in possession of the family property and liable to maintain her.—*Rama-swamy Aiyan* v. *Minakshi Ammal* and another.—Mad. H. C. Rep. Vol. II, p. 409.

A Hindú widow who had been supported by her father-in-law, after his death sued his eldest son for maintenance and obtained a decree for Rs. 150, notwithstanding the defendant's objection that, being one of three brothers who inherited their father's estate, he was not solely liable for the maintenance claimed.

Held that as this was a Small Cause Court suit, the appeal did not lie. The maintenance of a widow is by Hindú law a charge upon the whole estate and therefore upon every part thereof. The defendant might have the question raised by him decided by suing his brothers for contribution.—*Rama-chandra Dikshit* v. *Savitri-bai.*—Bom. H. C. Rep. Vol. IV, a. c. j. p. 73.

The fact of A having been long supported by B, or of his having been purchased either as a slave or as a *chela* will not entitle him to claim perpetual maintenance for himself and his heirs. Especially where A does not show that he has been deprived of ordinary means of livelihood which he might otherwise have commanded.—*Narain Dass* v. *Moharajah Mahtab Chund Bahadoor.*—S. W. R. Vol. VII, p. 137.

Admitted legal opinions.

An expelled wife is not entitled to demand a share of her husband's property.

Q. A person had two wives, who quarrelled with each other, and the husband turned away his senior wife from his family house. In this case, is the first wife, during the husband's life, entitled to a share of his property? If so, to what proportion?

R. Under the circumstances stated, the wife is not entitled to demand a share of her husband's property.

MANU has declared, that a mother and a father, in their old age, a virtuous wife, and an infant son, must be maintained, even though doing a hundred times that which ought not to be done.

According to the preceding authorities, the eldest wife is entitled only to a sum sufficient for the necessary expenses attendant on her food and raiment, even though expelled from her husband's house. It is the general rule, that a wife must be maintained by her husband.

Zillah Sarun, July 10th, 1812.—Macn. H. L. Vol. II, Chap. II, Case 3.

There is no provision for alimony in the Hindú law, but only for maintenance.

Q. A widow was in possession of some property, which had devolved on her at the death of her husband. The widow of her son (who died before his father) sues her for alimony to a specific amount; and on referring the case to a *pundit,* the following *Vyavasthá* was given: that "if a widow live in the house of her mother-in-law, the latter should afford her food and raiment; but that no rules as to a specific portion on account of alimony had been laid down in the law, and that this should be determined by extent of means." Is it then necessary, supposing that a disagreement should subsist between the mother and daughter-in-law, that the latter should live with the former? If there should be any established rule making it incumbent to give alimony to the family of the person in possession of the estate, and the person in possession should not give alimony in proportion to the extent of the means, in such case, is it competent to any authority to fix the amount to be given?

R. While the father and other relations of her husband exist, the residence of a widow in their house is declared to be obligatory on her; and the law does not contemplate any case of opposition to this rule, as in the following text.

The father-in-law and the rest are bound to maintain a virtuous and childless widow; but there is no provision for a case in which alimony* may be sued for, not having been given in proportion to the means: "Let them (the brothers) allow a maintenance to his (brother's) women for life."—*Patna Court of Appeal. February 25th,* 1870.—Macn. H. L. Vol. II, Chap. II, Case 4.

* This word, according to its rendering in English law, is not exactly applicable; but there does not appear to be any other better suited to express the sense of the original. Though the Hindú law does not recognise alimony, yet the amount of maintenance is specified with sufficient precision.

An unchaste widow is not entitled to maintenance from her husband's brothers, even though she may have resigned her right to his property in their favor, in consideration of such maintenance.—Macn. H. L. Vol. II, Chap. ii, Case 5.

Sons are bound to maintain their aged parents.—Macn. H. L. Vol. II, Chap. ii, Case 6.

According to the law as current in Benares, the widow of a nephew is entitled to maintenance only from his uncles with whom he was in partnership.

Q. A merchant died, leaving three sons, who succeeded jointly to the property of their father, and continued to carry on his merchantile concerns. The eldest of these brothers also died, and was succeeded by a son, who remained as a partner in the business with his uncles, and he died childless, leaving a widow. Under these circumstances, is the widow entitled to a share of the property held in coparcenary by her husband and his uncles, or merely to subsistence; and if the former, is she entitled to her husband's share, or less than that?

R. Supposing the merchant to have died leaving three sons, and they to have carried on in coparcenary his commercial concerns, and the elder of them to have died leaving a son, who also died leaving a widow, while the property was undivided; in this case, the widow has no title to her husband's share, but she is entitled to her maintenance, as declared by a text: "To the childless wives of brothers and of sons, strictly observing the conduct prescribed, their spiritual parent must allot mere food and old garments which are not tattered.†—*Patna Court of Appeal, May 8th,* 1811.—*Mussummat Chourasee,* pauper, v. *Kurmoo Bhukut* and another.—Macn. H. L. Vol. II, Chap. II, Case 7.

A widow whose husband died before his father has a legal claim to maintenance only.—Macn. H. L. Vol. II, Chap. ii, Case 8.

A woman cannot inherit immediately from her step-son, but she is entitled to maintenance from his heir.—Macn. H. L. Vol. II, Chap ii, Case 9.

A son, on succeeding to his father's estate, must maintain his step-mother and her daughters.

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† SANKHA.

Q. A person died, leaving two sons by one wife (who died before him), and a widow and her two daughters, and subsequently to his death one of the sons died. There are now surviving a son of his first wife, and a widow and her two daughters ; and supposing the widow to have received no portion of the property from her step-son, in this case, is she entitled to any share of the estate ; and if so, what is the extent of her right ?

R. The widow is only entitled to a proper maintenance from her step-son, and if her two daughters have not been disposed of in marriage, they will also have some share of their father's wealth to defray their nuptial expenses. Should they, after marriage, be in want of maintenance, in consequence of their husbands' inability to support them, they must be provided with food and raiment by their half-brother. This is conformable to the *Dáya-bhága* and other authorities. *Zillah 24-Pergunnahs, 24th January* 1818.—Macn. H. L. Vol. II, Chap. ii, Case 10.

The widow of a separated brother is not entitled to maintenance from her late husband's family.—Macn. H. L. Vol. II, Chap. ii, Case 11.

The illegitimate son of a person belonging to one of the regenerate tribes is entitled to maintenance only.

Q. A *Rajpoot* died, leaving a widow and a concubine of the *Aheer* tribe, by whom he had four sons; and on his death, his widow performed all the exequial ceremonies necessary on the occasion. In this case, are the sons and their mother entitled to any portion of the property left by the deceased owner ; and if so, to what proportion is each of the survivors entitled ?

R. Under the circumstances stated, the entire property left by the deceased, excepting such ornaments and clothes as were worn by the concubine and her sons, will devolve on the widow. The concubine and her sons have no right to share such property, but they are entitled to maintenance. This opinion is conformable to *Menu*, the *Mitakshará*, *Vivâda Ratnâkara*, *Vivâda Chintâmani*, and other authorities.

notwithstanding kinsmen, a father, a mother, or uterine brethren be present."

"Therefore, the widow of a person dying without male issue takes his entire heritage, even though his father and brother be living, because she confers benefit on her deceased husband by preserving her life with the enjoyment of his wealth, and by offering oblations to his manes: and if she, having become indigent, defile her chastity, then hell becomes her husband's portion. Under these circumstances, the preservation of her chastity and life is absolutely necessary. If, with the produce of their husbands' estate, their maintenance cannot be supplied, they (the widows) for the purpose of acquiring the means of subsistence, may mortgage, or sell a portion of their husbands' landed estate, and the sale in such case is legal and valid.

27th August 1808.—*Dowlut Singh,* v. *Bukhtawur Singh.*—Macn. H. L. Vol. II, Chap. xi, Case 12.

SECTION II.

ON PAYMENT OF DEBTS.

Calcutta, H. C.—*The 20th of June* 1866.

Present:

The Hon'ble F. B. Kemp and W. S. Seton Karr, *Judges.*

Sukeenah Banoo (one of the defendants,) Appellant,

versus

Huro Churn Buruj, (Plaintiff,) Respondent.

The payment of a debt incurred in conducting the *sradh* of a father is incumbent upon a son whether he is of age, or a minor or a posthumous son.

The purchaser is not bound to prove, that the sum borrowed was appropriated for the maintenance of the minor.

This was a suit to set aside an alienation made by the mother and brother of the plaintiff during his minority.

The necessity recited in the bill of sale is payment of debts incurred in performing the *sradh* of the father, and the maintenance of the minor, the plaintiff.

The Courts below have held that the money went to pay off the expenses of the *sradh,* and not that of the minor's maintenance, because the *sradh* of the father could not have been performed by the plaintiff inasmuch as he was not born at the time the father died, he was not liable to pay any portion of the debt incurred for that purpose.

With reference to the debt incurred for maintenance, the Courts below held that the *onus* of proving that the sum borrowed was appropriated for the purpose of the maintenance of the minor, was on the purchaser, special appellant before us, and that he had failed to prove such appropriation.

We are clearly of opinion that both the Lower Courts are wrong. The payment of a debt incurred in conducting the *sradh* of a father is incumbent upon a son whether he was of age, or a minor or a posthumous son of the deceased. (See page 297 Volume II). Macnaughten's Hidoo Law.)

The Courts below are also wrong in throwing the *onus* upon the purchaser of proving the appropriation of the monies borrowed. This is contrary to the ruling of the Privy Council in the well-known case of Hanuman Pershad Pandey.

Finding, therefore, that the sale was made for purposes such as are recognized as legal necessities under the Hindoo Law, we reverse the decisions of the Lower Courts and decree this appeal.—S. W. R. Vol. VI, p. 34.

CALCUTTA, H. C.—*The 9th of June* 1864.

The Hon'ble G. Loch and F. A. Glover, *Judges*.

GUNGA NARAIN PAUL, (Plaintiff,) Appellant,

versus

UMESH CHUNDER BOSE AND OTHERS, (Defendants,) Respondents.

According to Hidu Law, a man's property is liable for his debts, and property descends to an heir burdened with the debts of the ancestor, which must all be satisfied before the heir can be said to have any interest in the property at all.

Where a decree was obtained against an heir for a debt of the ancestor, but before the property was sold in execution of such decree, the property was attached and sold in execution of a second decree for a personal debt of the heir. Held that the prior sale in execution of the second decree could give the purchaser no preferential right in the property over the subsequent purchaser in execution of the first decree.

LOCH, J.—One Choonee Lal died indebted. Previous to his death, a suit had been brought against him to recover the amount of a bond, and the decree passed against Monee Lal, nephew of the deceased, who, claiming under a will, had taken possession of the deceased's property, and obtained a certificate to administer to the estate. Execution was taken out, and Mouzah Chittra, the property in dispute, was attached by the judgment-creditor in Srabun 1268. In the course of the same year, another suit by a different party was instituted against Monee Lal and his two brothers for a personal debt, and a decree obtained. Execution was taken out, and the same village attached in Aghran 1268, and the rights and interests of the judgment-debtors sold in Magh of the same year ; subsequently, the property was sold in Cheyt 1268 in execution of the first-mentioned decree.

decision of the Lower Court, and give a decree for the plaintiff with all costs.—S. W. Rep., for 1864, p. 277.

CALCUTTA, H. C.—*The 27th of April* 1865.

Present:

The Hon'ble G. Loch and F. A. Glover, *Puisne Judges.*

UNNO-POORNA DASSEA, (Respondent,) Petitioner,

versus

GUNGA NARAIN PAUL, (Appellant,) opposite party.

If two parties attach a property in execution of separate decrees, and the sale of property takes place at the instance of the decree-holder who made the second attachment, the decree-holder who made the first attachment will be first satisfied from the sale-proceeds, but the sale cannot be disturbed if such decree-holder instead of taking payment of his claim out of the sale-proceeds, puts up the rights and interests of his debtor in the property for sale.

There is nothing in the Hindoo law to show that the property of a deceased person is so hypothecated for his debts as to prevent his heir from disposing of it to a third party, or to allow a creditor to follow it and take it out of the hands of a third party, who has purchased in good faith and for valuable consideration. The creditor may hold the heir personally liable for the debt, but he cannot follow the property.

In conformity with the Resolution of the Court, dated 3rd February 1865, this case was argued before us. Against the application for review, it was urged—1st, that as the first decree-holder had, in execution, attached the property in question in the month of Srabun 1268, before it was attached by the other decree-holder in Aghran of the same year, the sale which took place in execution of the first decree, though subsequent in time to the sale under the second decree, must have the preference, because of the priority of the attachment; 2nd, that, under the Hindoo Law, an obligation rests on the heir to pay the debts of his ancestor, and the property cannot be considered to belong to the heirs till such debts have been paid. Consequently, a creditor of the ancestor has a lien in such property, and may follow it wherever he may find it, whether in the hands of the heir, or of a third party who has purchased it for valuable consideration in good faith from the heir.

On the *first* point, we think that the pleader is altogether mistaken. Priority of attachment entitles the attaching decree-holder

to have his claim satisfied first, but gives him no other preference. If two parties attach a property in execution of separate decrees, and the sale of the property takes place at the instance of the decree-holder who made the second attachment, the decree of the decree-holder who made the first attachment will be first satisfied from the sale proceeds; but the sale cannot be disturbed if such decree-holder, instead of taking his money out of the sale proceeds, put up the rights and interests of his debtor in the property again for sale.

On the *second* ground, we think that, in our judgment of 9th June 1864, we carried the doctrine of the liability of an heir under the Hindoo Law to pay the debts of his ancestor too far. There is, no doubt, a moral obligation to do so; but we do not find, nor can the pleader show us from any text of Hindoo Law, that the property of a deceased person is so hypothecated for his debts, as to prevent his heir from disposing of it to a third party, or to allow a creditor to follow it and take it out of the hands of a third party who has purchased in good faith and for valuable consideration. The creditor may hold the heir personally liable for the debt, if he have alienated the property, but he cannot, we think, follow the property. Under this view of the case, we set aside our former order, and confirm the order passed by the Judge on 14th August 1863. The petitioner will obtain his costs.—S. W. R. Vol. II, p. 296.

CALCUTTA H. C.—*The 27th of March* 1865.

Present:

The Hon'ble E. Jackson and F. A. Glover, *Judges.*

RAJ-ROOP SINGH and another (Plaintiffs,) Appellants,

versus

BUL-DEO SINGH and others (Defendants,) Respondents.

Heirs are liable for the debts of the person from whom they have inherited to the extent of the property which they have inherited. The question at issue in this suit, and upon which the special appeal is preferred, is the liability to sale in execution of a decree against one Hur-deo Roy, of a certain landed estate which was purchased by Hur-deo Roy's son Khema Singh, in the names of Khema Singh's sons.

We find that Khema Singh rested his right to hold this estate on the allegation that he had inherited no property from his father Hur-deo Roy, and the Judge has found upon very clear evidence, both oral and documentary, that this allegation of his was a deliberate falsehood. The Judge was accordingly correct in recording that Khema Singh was liable, and this estate, as in his possession, was liable for Hur-deo Roy's debts, until Khema Singh gave in a full account of all moneys and property to which he had succeeded as heir to Hur-deo Roy. The principle is that on which Section 203, Act VIII of 1859 makes heirs liable for the debts of the person from whom they have inherited to the extent to which they have so inherited. We think the Judge was correct in his law, and dismiss this appeal with costs.—S. W. R. Vol. II, p. 258.

A widow is liable for a debt contracted by her husband. Such debt may be set off against any debt due to her.—*Grish Chunder Lahoory* v. *Koomaree Dabea.*—S. W. R. Vol. I, Mis. p. 24.

The grandson of a Hindu is bound to pay the debt of his grandfather, independent of assets, but without interest, according to the *Mitakshará* school.—*Nara-simha-rao Krishna-rao.* Appellant, *Antáji Virúpaksh* and others, respondents.—Bom. H. C. Rep. Vol. II, (2nd Ed.) p. 61.

But see Bombay Act VII of 1866, in which alteration is made in the Hindoo law on the above subject, and which has been quoted in this Section of the main book.

NOTE.—Brihaspati declares; "The sons must pay the debt of their father, when proved, as if it were their own, [that is] with interest; the son's son must pay the debt of his grandfather [but] *without interest*, and his son [that is, the greatgrandson] shall not be compelled to discharge it, [unless he be heir, and have assets.]" * * * * * *

The order of those bound to pay the debts (of one deceased) is thus told by *Yáynyavalkya* :—" He who has received the estate must pay the debts of it; and in like manner, he who takes the wife [of the deceased]; or the son, whose father's assets are not held by another [ananyáshrita] : but of one having no son, the other heirs [rikthinah], must pay the debts." * * *

"And first of all, he who has received the estate; on failure of him, the person who takes the wife; and on failure of him, the son, possessed of unalienated wealth [ananyáshrita]. If there be none, it must be paid by the grandsons, *but the principal only*. If they be not in existence, then the greatgrandson, the wife, daughter, or other heirs [rikthinah], if they have received the estate, must pay the debt—such is the meaning. It is not to be paid by the great-grandson, the wife or the others, if they have not taken the estate. But receipt of ever so small a portion of the estate, imposes the liability of liqui-

satisfying, the whole property which the deceased left must be given to the creditors, and then his heirs must be considered as absolved also from all claims.—Macn. H. L. Vol. II, Case 1.

The heir who takes the assets of a deceased debtor, must satisfy his creditors, as far as the assets go.—Macn. H. L. Vol. II, Chap. X, Case 6.

The debts of an ascetic follow his assets in the hands of his representatives.

Q. A person having contracted a debt, becomes a recluse; that is, enters into the order of an ascetic. His ancestral landed property falls into the hands of his brother's representatives. In this case, can the creditor realize his debt out of such property?

R. If the individual in question borrowed a sum of money, and relinquished the order of a house-keeper, leaving a patrimonial immovable estate in the possession of his relatives, in this case, those relatives who are in the enjoyment of his property are liable for the debt; and if they do not liquidate it, the creditor is competent to recover his money due from the debtor out of his property, as *Yájnyavalkya* propounds: "He who has received the estate of a proprietor leaving no son *capable of business*, must pay the debts *of the estate*, or, on failure of him, the person who takes the wife *of the deceased;* but not the son whose *father's* assets are held by another."

The law on this subject is more distinctly laid down in the Mitacshara and other authorities, in the Chapter treating of the payment of debts.—Macn. H. L. Vol. II, Chap. X. Case 12.

The survivors are answerable for a debt contracted by their deceased partner, if the sum borrowed was applied to their use.

Q. A father with his five sons lived jointly in respect of food and in the conduct of mercantile affairs. One of the sons contracted a debt for his private use, and not on account of the joint concern. On the expiration of the period agreed upon for the discharge of the debt, the creditor brought an action against the debtor who subsequently died before his father and four brothers, leaving a widow. The father and brothers of the deceased are enjoying the joint property. In this case, should the debt be liquidated out of the joint funds of the concern?

R. Supposing the debtor living with his father and brothers as a joint family and having joint dealings with them, to have contracted the debt for his private use, and that the produce of the land and other estate purchased with the sum borrowed was expended for the use of the joint jamily or joint trade, then the father and brothers who jointly possess the ancestral property should liquidate the debt.* But according to the doctrines of *Manu*, the *Mitakshará*, *Viváda-chintámani* and *Vivádárnava-setu*, and other legal authorities, debts contracted for the following purposes will not be claimable from them. *Vrihaspati* :—"The sons are not compellable to pay sums due by their father for spiritual liquors, for losses at play, for promises made without any consideration, or under the influence of lust or of wrath, or sums for which he was a surety, (except in the cases before mentioned,) or a fine, or toll, or the balance of either.—Macn. H. L. Vol. II, Chap. X. Case 3.

Those who take the property of the deceased are bound to liquidate his debts.

Q. A person having borrowed a sum of money established a shop with the said money, and then died. Subsequently to his death, his father and brothers appropriated all the goods that were in the shop. In this case, is the satisfaction of the debt contracted by the deceased incumbent on his father and brothers, or not? And supposing the debtor to have left a widow, who took no part of the property left in the shop, is she nevertheless responsible for his debt, or otherwise?

R. Under the circumstances stated, the debtor's father and brother are bound to liquidate his debt, but his widow cannot be held liable for it.

Authorities.

The text of *Yájnavalkya* cited in the Mitákshará, and other books of law :—"If one of *two or more parceners* or undivided kinsmen contract a debt for the support of the family, and either die, or be very long absent abroad, the other parceners or joint tenants shall pay it."

Macn. H. L. Vol. II, Chap. X, Case 10.

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* This appears to be only half an answer to the query; for it is unquestionable, that the brothers who took the estate are liable for the debts, as far as there may be assets, whether the money was borrowed by the deceased brother for his private use alone, or was expended for the benefit of the family at large.—Note by Sir W. Macnaughten.

Debts of a missing person must be paid by those in possession of his estate, without waiting twelve years for his re-appearance.

R. If a man contract a debt while he lives with his brothers, as an undivided and united family, and subsequently become missing, the debtor's brothers and wife who possess his estate must pay his debts, without waiting for expiration of twelve years.

Authorities.

Yájnavalkya. See *ante,* page 622. A debt contracted before partition by an uncle, or a brother, or a mother, for the support of the family, all the parceners or joint tenants shall discharge.

Nárada :—The creditor need not wait a specific time; for there is no authority for such a supposition.

Macn. H. L. Vol. II, Chap. X, Case 5.

Circumstances under which a father must pay a debt contracted by his deceased son.

Q. A son being in a state of union with his father as a joint family, died, and no property of the son came into the father's hands. In this case, is the liquidation of a debt contracted by the son, incumbent on the father, or not?

R. Supposing the son to have died childless, and involved in debt, while the family were undivided, and the father not to have received any assets belonging to his son, he is not in this case bound to liquidate his debt, unless the debt were contracted by the son for the purpose of the family support, or the conduct of religious observances which were incumbent on the family; or unless the father, after the debt was contracted, promised to satisfy the claim of his son's creditor, in which cases the liquidation becomes incumbent on the father.

Zillah Aligurh, April 15, 1818.—Manc. H. L. Vol. II, Chap. x, Case 9.

Responsa Prudentum.

Questions.

1. Is the son bound to discharge a debt contracted by the father?

2. The father having in his life-time given his son a release, exonerating him from his debts, and living separately from him, is the son still liable notwithstanding?

moral and religious, not civil.—See note on *Jagannátha*, Dig. b. i. Clxvii. C.

Stra. H. L. Vol. II, (2nd Ed.) pp. 277, 278.

The defendant, a widow, is sued for a debt contracted by her husband's father, who is dead, her husband being also dead, having left a son, who however is only an infant. Is the action maintainable against the grandson ?

Answer.—Failing the son, the grandson of him who contracted the debts is liable; consequently the infant alluded to when he comes of age.

Remark.—Provided the father's estate be not possessed by another; (*Jagan-nátha's* Dig. b. i. clxxi. &c.) or, if there be no assets provided the grandson were not separated from the family partnership:—and, at all events, being a minor, he cannot be called upon to pay the debt, until he have attained the age of sixteen. *Kátyáyana,* cited by *Jagan-natha,* Dig. b. i. clxxxvii. " Nor is he liable for interest payable out of his own funds."—(*Ibid.* cxcvii.) C.

Stra. H. L. Vol. II, (2nd Ed.) p. 279.

A woman is not in general liable for the debts of her husband. See passages quoted in *Jagan-nátha's* Dig. b, i. ccvii, &c. But, if she, or any other person, possess assets of the debtor, his debts must be discharged out of such funds; (*Ibid.* ccxx,) and this, whether enough remain for her maintenance, or not.

The case of her undertaking for the debt would be a special one; but it is not so stated in the question. C.

Stra. H. L. Vol. II, (2nd Ed.) page 280.

Assets are to be pursued, into whatever hands. See *Nárada,* cited by *Jagan-nátha* Dig. b. i. Clxxii, and innumerable other authorities, may be cited, were it requisite in so plain a case. C.

Stra. H. L. Vol. II, (2nd Ed.) p. 282.

The law directs the debts as well as effects to be divided. *Mit.* on Inh. Chap. I, Sect. iii, § 1 & 9. This, however, is an adjustment among the parceners, which cannot bar the plaintiff's remedy against all, or any of the debtors, who were jointly bound; or against his particular debtor, if it were a separate debt. C.

Stra. H. L. Vol. II, (2nd Ed.) pp. 283—284.

The benefit of ss. 11 and 12 of Act xiv of 1859 is not limited to the period when the disability of minority has ceased, but applies also to the period during which the disability continues; and, therefore, during the latter period, it is open to the minor to sue by his guardian.

On the death without issue of a member of a Hindú family joint in estate and subject to the *Mitákshará* law, his undivided share in the joint family property passes to the surviving members of the joint family and not to his widows, and cannot be made liable for his debts under decrees obtained against his widows as his representative.*

Quære, where a member of a joint Hindú family governed by the *Mitákshará* law, without the consent of his co-sharers, and in order to raise money on his own account, and not for the benefit of the joint family, mortgages in his life-time his undivided share in a portion of the joint family property, can the other members of the joint family, on his death, recover from the mortgagee the mortgaged share, or any portion of it, without redeeming?

A suit by a surviving member of a joint Hindú family subject to the *Mitákshará* law, to recover a moiety of the undivided share of a deceased member of the family in the joint family property, ought not to be dismissed on the ground that all the members of the family have not joined in bringing the suit, where it appears that the only other surviving member of the family has already sued for and recovered his moiety of the property, and disclaims all further interest, and is joined as a co-defendant in the suit.—Indian Law Report, Calcutta Series Vol. I, p. 226.

Sons in possession of family property, are liable for the payment of their father's debt, unless they can prove that the debt was incurred for an immoral purpose or otherwise invalid.

The question whether a decree-debt was invalid can not be opened at the execution stage; but must form the subject of an independent suit.—*Burtoo Singh* v. *Ram Purmessur Singh* and others.—S. W. R. Vol. XXIV, p. 255.

* By this part is upheld the High Court's Full Bench decision passed in the very suit. See Precedents page, 149.

is entitled to a decree against the sons upon simply proving the loan and the instrument of charge, and that his right to a decree can only be defeated, in the event of the sons showing that the money was advanced for an immoral purpose. In other words, any charge which the father may create upon the ancestral immoveable property during the minority of his sons is a valid charge, and must be satisfied out of that property, unless the sons, on whom the Judge throws the burden of proof, can show that the charge was created to secure money borrowed by the father for immoral purposes. If this be good law, it follows that the interests in the ancestral immoveable property, which, under the Mitakshara law, are vested in sons by their birth, are entirely unprotected from the selfish or wasteful or capricious acts of the father except in the single instance of money borrowed by him upon the estate for immoral purposes.

The decisions on which the Officiating Judge relies in support of a proposition fraught with such serious consequences, are *Girdharee Lall* v. *Kantoo Lall** and *Muddun Gopaul Laul* v. *Mussammat Gourun-butty*.† But neither of these cases, when examined with reference to the facts involved in them, can, in my opinion, be considered as authorities for any such doctrine.

In *Girdharee Lall* v. *Kantoo Lall*, the suit was brought by sons for the purpose of setting aside a deed of sale of ancestral property executed by their father, and also of recovering from the purchaser the whole of the property which purported to pass by the deed.

Their Lordships' decision, as I understood it, proceeds on the ground that a *primâ facie* case of necessity for the sale had been shown, against which no rebutting evidence had been offered, and that as, moreover, a considerable portion of the purchase money had been proved to be applied for purposes which would make the sale binding on the sons, their suit to set aside the sale could not be maintained.

In *Muddun Gopal Lall* v. *Mussummat Gourun-butty*, sons were again the plaintiffs, and brought a suit against their father and elder brother, and certain persons who claimed interests in the ancestral estate under bonds, or as purchasers in execution of decrees

* 14 B. L. R., 187; S. C., L. R. See *ante*, p. 72.

† 15 B. L. R., 264; S. C., 23, 1 I. A. 221 and 22 W. R., 565. *Ante*, p 176.

obtained on bonds, praying for a partition of the ancestral estate and for possession of their shares free from encumbrances by cancelment of the bonds. Phear J., in delivering the Court's judgment, which was given in those appeals at the same time, states, as the facts found "that in Muddun Gopal's case the plaintiff's father and elder brother had mortgaged 8 annas of the joint property to Muddun Gopal in consideration of a loan of money which was wanted for a family purpose; and that in the cases of Girdharee Lall and Pooran Lall, the plaintiff's father and elder brother had mortgaged 8 annas of the joint property in order to prevent the sale of that property at the instance of Girdharee Lall and Pooran Lall, in execution of decrees which these persons had respectively obtained against the father and eldest son personally." And the Court then held that, under these circumstances, the plaintiffs, the minor sons, were not entitled to obtain their share of the joint property free from these mortgages.

In neither of the decisions which are relied on by the Officiating Judge was the suit brought by a bond-holder or mortgagee against the father and sons to enforce a charge upon the ancestral estate created by the father, and in both of the decisions it is clear that the transaction of the father, whether it consisted of a sale or a loan, was inquired into by the Court with a view to see if there was any legal necessity for the transaction, or if it had reference to family purposes, and that the result of that inquiry formed the main ingredient of the decisions arrived at.

The liability of a son for the debts of his deceased father under Hindú law appears to me to be a distinct question from the right of a father in his life-time to charge the interest of his infant sons in the joint ancestral immoveable estate with the payment of a debt. It is the latter question which is before the Court in the present suit; and to arrive at a correct decision, I think that the principles to be applied are those which are laid down in the leading case of *Hunooman Persad* v. *Mussammat Babooee.** The authority of that case has been often recognized in the Privy Council, and notably in *Lalla Bunseedhur* v. *Koonwar Bindesuree*,† and

* 6. Moore's I. A., p. 393.

† 10 Moore's I. A., 454, at p. 461.

also in *Girdharee Lall* v. *Kantoo Lall.** In *Hunooman Persad's* case, the mortgage was made by a mother and widow, as guardian of her infant son and manager of his estate, but so far as relates to the interests in the ancestral estate which sons get by birth under the Mitákshará law, and the right of the father to alienate the same, there seems to be no essential difference between the position of the father when dealing with those interests during the minority of his sons, and the position of a mother when dealing as guardian and manager of her infant son's estate. Lord Justice Knight Bruce says in *Hunooman Persad's case*: "The power of the manager for an infant heir to charge an estate not his own is, under the Hindú law, a limited and qualified power; it can only be exercised rightly in a case of need or for the benefit of the estate;" and with respect to the question on whom the *onus* of proof lies, his Lordship, after stating that the *onus* will vary with the circumstances, proceeds to say: "When the mortgagee himself with whom the transaction took place is setting up a charge in his favour made by one whose title to alienate he necessarily knows to be limited and qualified, he may be reasonably expected to allege and prove facts presumably better known to him than to the infant heir,—namely, those facts which embody the representations made to him of the alleged need of the estate and the motives influencing his immediate loan."

Taking these to be the principles of law applicable to the decision of this suit, I am of opinion, that the Officiating Judge was wrong in holding that it lay upon the special appellants to prove that the loan was contracted by the father for immoral purposes, and that on their failing to do so, the respondent was entitled to a decree for a sale of the special appellants' interests in the ancestral property. Before he was entitled to such a decree, I think it was incumbent upon the respondent to show for what purpose the loan was contracted and that *that* purpose was one which justified the father in charging, or which the respondent had at least good grounds for believing did justify the father in charging, the interests which the special appellants have in the ancestral immoveable property. As the respondent has failed to show this either in the

* 14. B. L. R., 187; S. C., L. R.,—1 I. A., 321; and 22 W. R., 56.

the case of *Girdharee Lall* v. *Kantoo Lall** (xxii Weekly Reporter, 56). The fact that one member of the family is separate in residence and mess, in no way affects his position as to the ancestral property until a separation in estate has taken place.

It is clear that the present case must be governed by the decision of the Privy Council just referred to. The original debt is not shown to have been incurred for any improper purpose, and the property which is the subject of suit was sold to save the rest of the estate.

The decrees of the Lower Courts must be reversed, and the plaintiff's suit dismissed with all costs.—S. W. R., Vol. XXV, page 116.

A person lending money on security of the property of undivided Hindú family, is bound to make enquiries as to the necessity that exists for such a loan. If he lends the money after reasonable enquiry, and *boná fide* believing it will be properly expended, he is not bound to see to the application of it. The rule is the same whether all the members of the family are adults or minors.—*Gane Bhive Parap et al.* Versus *Kane Bhive et al.*—Bom. H. C. R. Vol. iv, a. c. j. p. 169.

ALLAHABAD, H. C. A.—*The 26th of August* 1875.

(Mr. Justice Turner, *Officiating Chief Justice,* and Mr. Justice Oldfield.)

BULDEO DAS (Paintiff,) *versus* SHAM LAL (Defendant.)†

The sons in an undivided Hindú family, although they have a proprietary right in the paternal and ancestral estate, have not independent dominion.

Where, therefore, the plaintiff sued to eject the defendant, his son, from a portion of a house, partly self-acquired by the plaintiff and partly ancestral property, in which the defendant was living against the plaintiff's will, the Court decreed the claim.

The plaintiff and the defendant, Hindús, were father and son. The plaintiff sued to eject his son from a portion of a house of which he had taken possession on its being vacated by a tenant. The defendant replied that the plaintiff had no right to eject him,

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* See *ante*, page 72.

† Special Appeal No. 185 of 1875, from a decree of the Subordinate Judge of Moradabad, dated the 8th of December, 1874, reversing a decree of the Munsif, dated the 14th May, 1874.

the house being ancestral property, in which father and son had equal rights.

The first Court found that a portion of the house was ancestral property, and a portion acquired by purchase by the plaintiff from his brother, and decreed the claim, holding that, under Hindú law, a son could not enforce a right to possession of any property, whether ancestral or self-acquired, in his father's lifetime. The lower appellate court dismissed the suit on the ground that, under Hindú law, sons have equal rights with their fathers in immoveable ancestral property.

The plaintiff appealed to the High Court. The pleas set out in the memorandum of appeal were that, under Hindú law, a son was not entitled to take possession of any portion of ancestral property without the father's consent; and that, as a moiety of the property in dispute was the plaintiff's self-acquired property, he was entitled to eject the defendant.

Oldfield, J.—(Who, after stating the facts as above, continued) :—

The decree of the Court of first instance should, in my opinion, be restored.

A son, no doubt, takes by birth a vested interest in immoveable ancestral property, and there is authority for considering that his interest in the father's life-time, and before partition, is a present interest of a proprietary and coparcenary nature—(*Mitákshará*, ch. i, s. 1 and s. 5); and the power to enforce partition of the ancestral estate implies such an interest, looking to the definition of partition given in the *Mitákshará*, ch. i, s. 1, para 4, and ch. i, s. 1, para 23. But even assuming such ownership on the part of the son, yet until partition takes place, or until the death of the father, natural or civil, the father, by reason of his paternal relation, and his position as head of the family, and its manager, is entitled to make lawful disposition of the property in the interest of the family. This is shown by ch. i, s. 5, paras 9 and 10, *Mitákshará*, which by marking the extent of the son's power of interference in the father's disposition of the property, shows that the power of disposition within certain limits is centered in the father. The son's enjoyment of the property is subject to the dispositions lawfully made by the father, and, if dissatisfied, the son's remedy will lie in any right he may possess to enforce partition of the estate.

In this case there has been no illegal disposition of the property on the part of the father. It appears that the defendant objects to live with his mother-in-law, and insists on occupying part of a house, which used to be rented, and which his father desires to dispose of in the way he considers most advisable.

I would decree the appeal and decree the claim, but, looking to the relationship subsisting between the parties, they should bear their own costs in all courts.

Turner, Offg. C. J.—I concur in decreeing the appeal. Sons, who are members of an undivided Hindú family, acquire by birth an interest in the paternal as well as the ancestral estate, and are entitled in certain events to interfere to prevent waste or to enforce partition in the lifetime, and without the consent, of their father, but, while their interest is proprietary, it lacks the incident of dominion. "They have not independent dominion, although they have a proprietary right." Colebrooke's Digest of Hindú Law, Bk. v, Ch. VII, § 433, Vol, ii, p. 562, 3d.-ed.—Indian Law Reports, Allahabad Series, Vol. I, p. 77.

A Hindú brother who during the life-time of a deceased debtor was separate in transaction and lived separately from him, and was therefore not a joint member of the same family, is not his legal representative after his death.—*Tekait Chumun Singh, Appellant,* versus *Kullyan Suhae, Respondent.—S. W. R. Vol.* xxiii p. 231.

ALLAHABAD H. C. A.—*The 27th of August* 1875.

Before a Full Bench.

(Mr. Justice Turner, *Officiating Chief Justice,* Mr. Justice Pearson, and Mr. Justice Spankie.)

DEBI PARSAD and others (Defendants)

versus

THAKUR DIAL and others (Plaintiffs.)

When, in an undivided Hindú family living under the *Mitákshará* law, a brother dies without leaving issue, but leaving brothers, and nephews, the sons of a predeceased brother, the interest in the joint estate of the brother so dying does not pass on

his death to his surviving brothers, but on partition the whole estate, including the interest of the brother so dying, is divisible, and the right of representation secures to the sons or grandsons of a deceased brother the share which their father or grandfather would have taken, had he survived the period of distribution.

Madho Singh v. Bindessory Roy* over ruled.

Durga, Bisheshar, Bhairo, and Ram Pargas were four brothers united in estate. Ram Pargas died leaving sons who were the plaintiffs in this suit. Then Durga and Bhairo died without issue. Finally Bisheshar died leaving sons who were the defendants in this suit.

The principal issue raised by the suit was whether the plaintiffs were entitled on partition to a moiety of the undivided immoveable estate of the family, or to one-fourth. The first Court held, having regard to the answers to the questions 3 and 4 given in p. 33, Bk. ii., West and Bühler's Digest of Hindú Law Cases, to bywasthá No. 2, dated 5th July, 1860, Bywasthás, S. D. A., N. W. P., vol. I., part I, and to the opinion of three of the Benares *pandits* whom it examined on the point, that the plaintiffs were entitled to a moiety of the estate.

The first plea taken by the defendants on appeal by them to the High Court impugned this ruling. With reference to that plea, the Court (Pearson and Spankie, JJ.,) referred to the Full Bench the following question, *viz* :—

"Whether, in a joint family property, two of four brothers dying without issue, their interest passed on their death to their surviving brother exclusively, or whether the sons of a brother who predeceased them are entitled to participate in it?"

The order of reference was accompanied with these remarks :—

Had Bhairo and Durga left separate estates, there can be no doubt that their surviving brother would have succeeded to them in preference to, and to the exclusion of, their nephews; and it is contended that the succession would not be different in a joint undivided family. The contention is supported by the decision of a Bench of this Court, dated the 25th February, 1868, in special appeal No. 1779, of 1867, at page 101 of the High Court Reports for 1868. The ruling of the lower Court in this case is opposed to

* H. C. R., N. W. P., 1868, p. 101.

that decision, but is supported by the answers to the questions 3 and 4 given in page 33, Bk ii, West and Bühler's Digest, and by the opinions of the Benares *pandits* examined by the Subordinate Judge. Under the circumstances we think it expedient to refer the point in question for the consideration of a Full Bench.

The opinion of the Full Bench was as follows :—

To the answer to the question proposed to us it is necessary to consider the condition of the Hindú family in these Provinces while it remains undivided, and to inquire whether the same rules of succession apply while the members continue joint in estate, when they separated and effected partition and when they have re-united.

Sir Thomas Strange in the ninth chapter* of his work on Hindú Law declares that " wherever a plurality of sons exists, the inheritance descends to them as coparceners making together but one heir" * * * " the deceased may have left, not only more sons than one, but brothers, as well as a widow or widows, and daughters, together with other dependants; and such sons and brothers may have their wives and childern respectively; the whole having constituted in his lifetime, not so many coparceners indeed in the proper sense of the term, but an undivided family. Or supposing him to have been a single man, with collateral relations only, their descendants and connexions, all living together in coparcenary, his death makes no difference in this respect among the survivors." If undivided at his death they still continue so in point of law, however appearances may indicate a different state. So long as they remain joint they offer one common sacrifice. " The religious duty of unseparated brethren is single," Nareda, quoted in the *Mitákshará*, ch. ii, s.12, *v.* 3,—until partition takes place.

In respect of property, whatever is acquired by the several members, with certain exceptions, falls into, and becomes part of, the common fund, and the expenses of all members are met from this common fund; no account being taken of excess in the expenditure of some over the expenditure of other members. This community of worship and property being the ordinary condition of a Hindú family, it is to be presumed that a Hindú family is undivided until the contrary is shown, and that the acquisi-

* On partition, 4th ed. p. 198.

tions of the several members from part of the common stock unless the acquirer, or those claiming under him, prove that it was acquired in such a manner as would, by the special provisions of the law, constitute it the sole property of the acquirer.

Moreover, "according to the true constitution of an undivided Hindú family, no individual member of the family, whilst it remains undivided, can predicate of the joint and undivided property, that he has a certain share".—*Appovier* v. *Rama Subba Aiyan**; while a Full Bench of the High Court of Calcutta has gone so far as to hold, in *Sadabart Prashad Sahu* v. *Foolbas Koer*†, that under the *Mitákshará* law one of the several members of a joint Hindú family cannot, without legal necessity, alienate any portion of the undivided ancestral property without the consent of the whole of the co-sharers, and that such an alienation is not valid, even for the share to which the alienor would have been entitled on partition.

The condition of an undivided family being such as has been described, it is not unintelligible that rules may govern the distribution of the joint inheritance different from those which would regulate the devolution of separate property, and it has been ruled that in one and the same family different rules may govern the succession to the estate of a deceased member according to the nature of the different properties comprising it, whether it be joint or separate.—*Katama Natchier* v. *The Rajah of Shiva-gunga*‡.

The peculiar incidents of the joint property of an undivided family are survivorship and the right of representation. In the Shiva-gunga case above cited the Lords of the Privy Council declared that, "according to the principles of Hindú law, there is coparcenership between the different members of a united family, and survivorship following upon it. There is community of interest and unity of possession between all the members of the family, and upon the death of any one of them the others may well take by survivorship that in which they had during the deceased's lifetime a common interest and a common possession."§ It has been

* 11 Moore's Ind. App. 75.

† 12. W. R. F. B. 1. ;—s. c. 3 B. L. R. F. B. 31. *Ante* p.

‡ 9 Moore's Ind. App. at p. 610.

§ *Ibid.* At page 611.

argued that this is a mere statement of the general rule, and that it does not necessarily follow from it that the benefit of survivorship extends to all and not only to some of the surviving members of the family. When once the principle of survivorship is admitted, it is difficult in the absence of express law to limit its operation. The principle of survivorship taking effect on the common fund, in which no one of the members of the family has any distinct share, operates not to augment the rights of any particular class of the coparceners but to enlarge the shares which upon partition would fall to the lot of every one of the members. In effect, by the operation of this rule the share to which a coparcener dying without issue would have been entitled does not pass by descent but lapses. The right of representation operates at the time of partition to secure an equal partition of the inheritance between the several sons of the common ancestor and the issue to the third generation of sons who have died leaving issue surviving the period of distribution, such issue taking *per stirpes* the share of their father or forefather.—"Should a younger brother die before partition, his share shall be allotted to his son, provided he had received no fortune from his grandfather. That son's son shall receive his father's share from his uncle, or from his uncle's son, and the same proportionate share shall be allotted to all the brothers according to law. Or if that grandson be also dead his son takes the share; beyond him the succession stops." *Kátyáyana* cited in *Vyavahára Mayúkha*, Ch. IV, s. 4, *v.* 21. "Although grandsons have by birth a right in the grandfather's estate equally with sons, still the distribution of the grandfather's property must be adjusted through their father, and not with reference to themselves. The meaning here expressed is this : if unseparated brothers die, leaving male issue, and the number of sons be unequal, one having two sons, another three and a third four, the two receive a single share in right of their father, the other three take one share appertaining to their father, and the remaining four similarly obtain one share due to their father. So if some of the sons be living and some have died leaving male issue, the same method should be observed: the surviving sons take their own allotments, and the sons of their deceased brothers receive the shares of their own fathers respectively. Such is the adjustment prescribed by the text" *Mitákshará*, Ch. I, s. 5, *v.* 2. "A grandson

(D) whose father (B) is dead, and a great-grandson (F) whose father (E) and grandfather (C) are dead, participate equally in the inheritance with the son (A), for they without distinction confer equal benefits on the deceased owner of the property by the presentation to him of funeral offerings at solemn "obsequies." *Dáya-krama Sangraha*, Ch. I, s. 1 *v.* 3. Unless authority be shown to the contrary, these incidents of the joint estate of an unseparated Hindú family, survivorship and the right of representation, govern the case before us and determine the answer to be given to the question put to us. The fathers and uncles of the parties lived as an unseparated Hindú family in possession of an undivided estate. Assuming partition to be made now, there are living representatives of two sons only of the common ancestor, and equal partition being made between the stocks, each stock is entitled to one moiety; but it is argued that, inasmuch as the father of the one line died before any of his three brothers, and the father of the other line died after two other brothers, who died without male issue, the shares of the brethren dying without male issue descended to the sole surviving brother and passed from him to his issue to the exclusion of the line of the brother who died first—in other words, it is contended that the case is not to be governed by the law of survivorship, except so far as to exclude females, but that the shares of the deceased brothers passed to the surviving brother in virtue of the rule that "in case of competition between brothers and nephews, the nephews have no title to succession, for their right of inheritance is declared to be on failure of brothers." *Mitákshará*, Ch. II, s. 4, *v.* 8. No doubt, if this rule was intended not only to apply to the descent of the separate property of a brother but to operate on the share which he would have taken in the common property of the family had he survived the period of partition, the contention is correct; but if we carefully examine the system on which the *Mitákshará* is compiled and bear in mind the principles of Hindú law, as to which there can be no dispute, it will appear that the rule on which the contention is based cannot apply to the undivided ancestral estate, nor to any thing which has accrued to, and become part of, that estate. The author of the treatise commences with a definition of heritage, '*dáya*,' and distinguishes between the wealth of a father or grandfather which *becomes the property* of his sons or grandsons by *right of*

their being his sons and grandsons, and which the author consequently terms unobstructed, and property which *devolves* on parents, brothers and the rest, *on the demise* of the owner without male issue and which he terms liable to obstruction, because existence of issue or the survival of the owner impede its devolution. After investigating the nature of property and reviewing the methods by which it may be acquired, he declares the fundamental principle of the Hindú law obtaining in these Provinces that—'property in the paternal or ancestral estate is by birth'. He next describes the limitation to which the power of the father over ancestral and acquired wealth is subject, and having previously defined partition to be "the adjustment of divers rights regarding the whole, by distributing them on particular portions of the aggregate," he proceeds to declare in what manner and subject to what rules the common property of the family is to be distributed by partition in the fathers's life-time or after his decease. The consequence of the doctrine that a right in the paternal ancestral estate is acquired by birth is that there is in fact no devolution of the property from one owner to another, but that as each son comes into being, he forthwith acquires a right which would, on partition, reduce the shares of the other sons, and which, should he not survive partition and have issue, his son or grandson would take by substitution, and which, if he dies before that period, will simply lapse. There being no devolution of the property, the laws of descent are inapplicable.

If shares are not ascertained until the period of distribution, if, until that time, no one can declare he has any share in the common property, it accounts for the circumstances that in none of the treatises on Hindú law which have been brought to our notice is there any rule declaring what is to be done with the interest (it can hardly be called a share) in the common property which has been acquired by a member of the family who has not survived the period of distribution. On the other hand, there are express rules declaring that the partition is to be an equal partition, subject to the qualification that those who take by representation take only the share which he whom they respectively represent would have taken, had he survived partition.

coparcener acquires by birth does not lapse on his death without male issue, but passes under the law of succession to heirs other than direct issue, who presumably do not exist, and other than his widow, whose title is expressly denied, it follows that the right would devolve not on brothers only, but on those heirs also who are entitled to succeed in priority to brothers. Thus, a daughter, a daughter's son, a mother, or a father, might, on partition, claim the share of a deceased coparcener. No instance is cited in which such a claim has been allowed. The conclusion seems clear that s. 4, like the preceding sections of the chapter provides only for the devolution of the separate estate of the *propositus*.

But in support of the contention that the interest of a member of an undivided family in the common fund is a share, and that the rules respecting the succession of brothers operate, notwithstanding the *propositus* may have died in union with his brethren, and regulate the inheritance of that share, reference has been made to the provisions of s. 9, which treat of the succession to re-united kinsmen.

It is argued that brethren who have re-united are in the same position as those who have never separated; that the whole of the property is again brought into a common fund, each brother saying to the other "what is mine is thine, and thine is mine," yet nevertheless the interests of each is described as his *share* :—"A re-united brother shall keep the *share* of his re-united co-heir who is deceased."—*Yájnavalkya*, cited in *Mitákshará*, ch. ii, s. 9, v. 1—and inasmuch as on the death of a re-united brother without male issue his share devolves on re-united brethren of the whole blood, to the exclusion of re-united brethren of the half blood, or if there be no brethren of the whole blood in re-union, the re-united brethren of the half blood and the unassociated uterine brothers divide the share equally, it is contended that the principle of survivorship does not operate to over-rule the rules regulating the succession of brothers, but that so far as is possible effect is given to both.

To these arguments it may be replied that a distinction is recognized by Hindú writers between undivided and re-united brethren (Colebrooke's Digest, ccccxxx). Moreover a re-union implies a previous partition, in virtue of which each of the re-united

CALCUTTA H. C. A.—*The* 10*th of April* 1877.

Full Bench.

Before Sir Richard Garth, *Kt.*, *Chief Justice*, Mr. Justice Kemp, Mr. Justice Macpherson, Mr. Justice Markby, and Mr. Justice Ainslie.

BHIMUL DOSS, *alias* LALL BABOO (one of the Defendants)

versus

CHOONEE LALL (Plaintiff.)*

Where, in an undivided Hindú family living under the Mitákshará law, a person dies without leaving issue, but leaving a brother, and a nephew the son of a predeceased brother, the latter is not excluded from succession by the former.

Debi Parshad v. Thakur Dial † followed.

This case is referred by Garth, C. J., and Mitter, J., to a Full Bench in the following order of reference :—

Garth, C. J.—The Plaintiff and the defendant, special appellant, are related to each other as first cousins.

The plaintiff's case is this. The six sons of Banee Prosad lived as members of a joint Hindú family till the death of the fourth son, Jun-bhunjun Dass, which took place in 1276 (1869); Baboo Lall, Futteh Chund, and Jun-bhunjun died without issue, and upon these facts the plaintiff contends that he is entitled to one-third share of the family property.

The defendant, special appellant, contends that the plaintiff's father, Pirtum Lall, having predeceased Jun-bhunjun, the plaintiff is not entitled to the one-third share of the family property which he claims. The date of separation was disputed in the Courts below, but it has been found as a fact that it took place after the death of Jun-bhunjun. The defendant, special appellant, contends that, on the death of Jun-bhunjun, his interest in the joint family property devolved upon the surviving brothers Baboo Lall and Bhoku Lall alone, to the exclusion of the plaintiff and Dosanund, sons of Pirtum Lall and Hurro Lall, who had predeceased Jun-bhunjun.

The contention of the plaintiff on the other hand is, that, on Jun-bhunjun's death, his interest in the joint family property passed

* Special Appeal, No. 770 of 1875, against a decree of A. J. Elliot, Esq., Judge of Zillah Shahabad, dated the 18th of February, 1875, affirming a decree of Moulvie Mahomed Núrul Hossein, Munsif, Subordinate Judge of that district, dated the 21st of September, 1874.

† *Ante*, page 635.

to all the surviving members of the joint family. This contention is supported by a Full Bench decision of the Allahabad High Court in the case of *Debi Parshad* v. *Thakur Dial,* and also apparently by an important passage which occurs in the judgment of the Privy Council in the well-known Shivagunga case, upon which the above Full Bench decision appears mainly to be founded.

We entertain grave doubts whether the passage in the judgment of the Privy Council justifies the decision of the Allahabad High Court, and whether that passage is in accordance with the Mitakshara law; and as the question raised is one of great importance, and of very general application, we think it right to refer it to a Full Bench.

The question referred is, whether, in an undivided Hindú family governed by the Mitákshará law, if a brother dies leaving no issue, but leaving brothers and orphan nephews, who are members of the joint family, his interest in the family property passes on his death to his surviving brothers alone, or to all the surviving members of the joint family; and in case of a partition is that the principle according to which the respective shares of the persons entitled to succeed to that interest are to be apportioned ?

Garth, C. J.—This case raises precisely the same question which was decided by a Full Bench of the Allahabad High Court in the case of *Dabi Parshad* v. *Thakur Dial,** and we feel bound having regard to the weight of authority, to decide in accordance with that decision, that, under the circumstances stated in the case, interest of the deceased brother in the family property ought, in the event of a partition, to be divided between his nephew and his two brothers in equal shares.

This point was distinctly decided by the Sudder Dewanny Adawlut in the year 1802 in the case of *Duljeet Sing* v. *Sheomunook Sing*† and Mr. Colebrooke was one of the Judges who decided it. The same rule has been laid down since by other authorities, and is recognized by the Lords of the Privy Council in the case of *Katama Natchiar* v. the *Raja of Shivagunga.*‡

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* I. L. R., 1 All., 105. *Ante*, p. 635.
† 1. Sel. Rep., 59 : *Ante*, p. 195.
‡ 9 Moore's I. A., 539, at p. 611.

We do not find any authority conflicting expressly with those decisions; and we are, therefore, of opinion that the judgment of the Lower Court is right, and that this special appeal should be dismissed with costs. *Appeal dismissed.*

Indian Law Reports, Calcutta Series, Vol. II, p. 379.

The reversioners next after J. to the estate of S. deceased sued to avoid an alienation of S.'s estate affecting their reversionary right made by his widow. J. had not been heard of for eight or nine years, and there was no proof of his being alive. *Held* that his death might be presumed under the provisions of S. 108, Act I of 1872, for the purposes of the suit, although, in a suit for the purpose of administering the estate, the court might have to apply the Hindû law of succession prescribed when a person is missing and not dead. *Rameshar Roy* and others (defendants), *Bisheshar Singh* and others (plaintiffs.)—Indian Law Reports, Allahabad Series, vol. I, (F. B.) page 53.

To a suit by one member of a Hindû joint family, living under the Mitâksharâ law, for a specific share of the joint family property, all the members of the family are necessary parties.—*Nuthani Mahton* (defendant) versus *Manraj Mahton* (plaintiff.)—Indian Law Reports, Calcutta series, vol. II, p. 149.

In a suit by a Hindû, subject to the Mitâksharâ law, against certain auction-purchasers at a sale in execution of a decree against the father, to recover a portion of the ancestral estate by cancellation of the sale, it appeared that the property which was mortgaged by the bond upon which the decree was passed was not put up for sale. The decree provided "that the plaintiff recover the amount with costs and interest, and that the decree be executed against the property specified in the bond," and it also allowed interest at about 50 per cent., the rate in the bond, to the decree-holders. It was contended on behalf of the plaintiff that, upon a proper construction of the Privy Council Ruling in *Muddun Thakoor* v. *Kantoo Lall*,* the decree under which the property had been sold was an improper one. *Held* that, under the Privy Council Ruling, the purchaser is not bound to look beyond the decree. *Held* also, that an usurious

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* 14 B. L. R., 187. *Ante*, page 72.

rate of interest cannot be treated, within the principles of the above case, as showing that the decree was for a debt which the son was not bound to discharge.

Held further, that where a decree is against the mortgagor generally, coupled with a declaration of the lien, the decree-holder may proceed either against the person and his property or against the mortgaged property, though whether such a course will be allowed in any particular case is a matter for the discretion of the court executing the decree.—*Lutchmi Dai Koori* (plaintiff) versus *Asman Singh* and others (defendants).—Indian Law Reports, Calcutta series, vol. II, p. 213.

The general result of the authorities, both juridical and forensic, is that among the three regenerate classes of Hindús, (Brahmans, Khatriyas, and Vaishyas,) illegitimate children are entitled to maintenance, but cannot inherit, unless there be local usage to the contrary; and that, among the Súdra class, illegitimate children, in certain cases at least, do inherit. The extent to which this right exists, considered, and the texts of Hindú law books bearing on the point referred to.

According to *Vijnáneshwara,* the author of the *Mitákshará* (Chap I., Section 12), the father of an illegitimate son by a *Dásí* among Súdras may in his (the fathers's) life-time allot to such son a share equal to that of a legitimate son, and, if the father die without making such allotment, the illegitimate son by the *Dásí* is entitled to half the share of a legitimate son, and, if there be no legitimate son and no legitimate daughter or son of such a daughter, the illegitimate son by the *Dásí* takes the whole estate. If, however, there be a legitimate daughter or legitimate son of such a daughter, the illegitimate son would take only half the share of a legitimate son, and such daughter or daughter's son would take the residue of the property, subject to the charge of maintaining the widow of the deceased proprietor.

The *dictum* of Lord Cairns in *Sri-Gajapatti Rádhika* v. *Sri-Gajapatti Nilamani* (13 Moore Ind. App. 497; S. C. 6 Beng. L. R. 202; 14 Calc. W. R. P. C. 33, reversing 2 Mad. H. C. Rep. 369),—"Supposing the sons, or either of them, to have been legitimate,

the widow (of Padma-nábha) could have been entitled to maintenance only. Had both the sons been illegitimate, their claim, unless some special custom governed the case, (which is not in proof,) would have been to maintenance only. In this last-named case the widow would have had the ordinary estate of a Hindú widow"—commented upon and explained. The terms *Dást* and *Dási-putra*, as defined by various writers on Hindú law, discussed, and the rights by inheritance of a *Dási-putra* considered.

The condition that, in order to entitle the illegitimate offspring of a Súdra woman by a Súdra to inherit the property of the latter, or a share in it, she should, according to *Jímúta Váhana* and *Níla-kantha*, be an unmarried woman, has, in practice, been discarded in the Presidency of Bombay.

In this Presidency the illegitimate offspring of a kept woman, or continuous concubine, amongst Súdras, are on the same level as to inheritance as the issue of a female slave by a Súdra.

The custom of *Pát* marriage among the Marathas, and *Nátrá* amongst the inhabitants of Guzerat, referred to, and the authorities bearing on the subject considered and discussed.

The sons of a *Punarbhú* (twice-married woman) by a duly-contracted *Pát* marriage, *i. e.*, in accordance with the custom of the caste, are legitimate and, as to the right of inheritance and extent of shares, rank on a par with the sons by *lagna* marriage.

G, a Súdra woman, was married to T (also a Súdra) by *Pát* marriage, without having received a *chhor-chiti* (release) from her first husband, who was then living, or obtained any other sanction of her *Pát* with T:—

Held that the intercourse between G and T was adulterous, and that, therefore, the plaintiff, their son, being the result of such intercourse, was not entitled to take as *heir* even to the extent of half a share, and was not a *Dási-putra* within the scope of Jájnyavalkya's text, or recognized as such by other commentators. He was, however, held entitled to maintenance, as he had been recognized by T as his son.—*Ráhí* wife of *Tejá Kurad* and others (defendants, appellants) versus *Govinda Valad Tejá* (plaintiff, Respondent.)—Indian Law Reports, Bombay series, Vol. I, p. 97.

According to the doctrines of the Bengal school of Hindú law, a certain description only of illegitimate sons of a súdra by an

unmarried súdra woman is entitled to inherit the father's property in the absence of legitimate issue, *viz.*, the illegitimate sons of a súdra by a female slave or a female slave of his slave.

Per Mitter, J.—Marriage between parties in different sub-divisions of the súdra caste is prohibited unless sanctioned by any special custom, and no presumption in favor of the validity of such a marriage can be made, although long cohabitation has existed between the parties.

Per Markby, J.—Quœre, whether there is any legal restriction upon such a marriage?

Narain Dhara (plaintiff) v. *Rakhal Gain*, Guardian of Jonardon (defendant).—Indian Law Reports, Calcutta series, vol. I, p. 1.

Although an estate be not what is technically known in the north of India as a *ráj*, or what is known in the south of India as a *polliam*, the succession thereto may, under a *kuláchár*, or family custom, be governed by the rule of primogeniture.

Where the family to which ancestral property held in this peculiar manner belongs is subject to the Mitákshará law, and the property is not separate, the succession, in the event of a holder dying without male issue, is given to the next collateral male heir in preference to the widow or daughters of the deceased holder.

That an estate is *impartible* does not imply that it is separate, and so to be governed by the law applicable to separate succession.

Whether the general status of a Hindú family be joint or divided, property which is joint will follow one, and property which is separate will follow another, course of succession.

Since in documents between Hindús and in the Mitákshará itself it is not unusual to find the leading members of a class alone mentioned when it is intended to comprehend the whole class, a written statement of a family custom, whereby an impartible estate passes in the event of the holder dying without issue to *his younger brother* or *to his eldest son*, need not be construed as limiting the collateral succession to the two cases named, but as providing generally that on failure of the direct male line, the nearest male heir in the collateral line shall succeed.—*Chintaman Singh* (plaintiff) versus *Nowlukho Konwari* (defendant).—Privy Council, the 23rd of June and 1st of July 1875.—Indian Law Reports, Calcutta Series, Vol. I, page 153.

An uncle and nephews were in a state of general severalty, but held some ancestral property in common. Such tenure by the Hindú law of the Western Schools, will not establish the right of nephews to take their uncle's estate before his wife and daughter's son.—*Rajah Putni Mull* and *Roy Bunsidhur* appellants *versus Manohur Lall* and his minor brother.—Sel. S. D. A. R. Vol. IV, p. 349.

The digging of a tank, though a meritorious act and of great convenience to the public, is not a legal necessity for which a widow can alienate property left to her for life only.— *Runjeet Ram Koolal* (defendant) appellant, versus *Mohamed Waris* and others (plaintiffs) respondents.—S. W. R. Vol. XXI, c. r, p. 49.

Immovable property purchased by a Hindú widow with the profits of her husband's estate, there being no proof of any distinct intention on her part to sever such purchases from the estate and appropriate it to herself, held to form part of her husband's estate. *Gonda Kooer* and another (defendants) versus *Kooer Oodoy Sing* (plaintiff).—Privy Council,* the 6th, 7th, and 23rd of March 1874. Bengal Law Reports, vol. XIV, (P. C.) p. 159.

Sreemutty Soorjeemony Dassee v. *Denobundhoo Mullik*† distinguished.

PRIVY COUNCIL.‡—*The 4th and 5th of June* 1875.

[*On appeal from the High Court of Judicature at Fort William in Bengal.*]

BHAGBUTTI DEVI (Defendant)

versus

BHOLA-NATH THAKOOR and others (Plaintiffs).

In this case the decision of the High Court§ was reversed by the Privy Council, who held that the effect of the instruments was

* On appeal from the High Court of Judicature, North Western Provinces, Allahabad.

† 1 Moore's I. A. p. 123.

‡ *Present*:—Sir J. W. Colvile, Sir B. Peacock, Sir M. E. smith, and Sir Robert P. Colliar.

§ 7 B. L. R., 93.

to give the widow an estate for life with power to use the proceeds as she chose, and consequently that the proceeds or property purchased by her out of the proceeds would belong on her decease to her heirs. But as the decision turns entirely on the effect of the particular expressions used in the instruments and illustrates no principle of law, no detailed report is now given.—Indian Law Reports, Calcutta series, vol. I, p. 104.

The institution of a suit by a widow may have been beneficial to her as well as to those who would succeed her in the property, and yet not a necessity.

There is no necessity for a widow to borrow money when she has an income to pay the expenses of litigation.—*Roy Mukhun Laul* (plaintiff) appellant *versus Mr. W. Steward* and others (Defendants) Respondents.—S. W. R. Vol. XVIII, p. 121.

Where a widow raises money by mortgaging her husband's property, the mortgagee is not bound to look to the appropriation of the monies so raised, his responsibility ceasing when he has satisfied that there was legal necessity for the loan.—*Ram Persaud* and another (plaintiffs) Appellants *versus Mussummat Nag-bunshee Koer* and others (Defendants) Respondents.—S. W. R. Vol. IX, p. 501.

Where property to the immediate possession of which a Hindú widow is entitled is conveyed away by parties having no right to it, the cause of action for a suit to recover possession is afforded thereby to the widow, and not to reversionary heirs.

Quære—Have not the reversionary heirs a right to ask for a declaratory decree to the effect that as against ultimate heirs the possession of the trespassers and others should be considered as the possession of the widow?—*Joy Moorth Kooer* and another (plaintiffs) Appellants versus *Bulldeo Singh* and others (Defendants) Respondents.—S. W. R. Vol. XXI, p. 444.

CALCUTTA H. C. A.—*The* 11*th of April* 1864.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble L. S. Jackson, Shumbhoo Nath Pundit, E. P. Levinge, and E. Jackson, *Judges*.

LALLA JOTEE LALL, (Plaintiff) Appellant,

versus

Mussummat Dooranee Kooer and others (Defendants) Respondents.

A step-mother cannot take by inheritance from her step-son.

This case was referred for the opinion of a Full Bench by Mr. Justice Kemp and Mr. Justice Campbell.

The question to be considered is, whether, assuming the family to be a divided one, a step-mother can succeed to the estate of her step-son, according to the law prevalent in Mithila.

It is clear that, according to the law as current in Bengal, the step-mother cannot succeed to the estate of her step-son.

But, it is contended that, according to the *Mitákshará*, which is the law prevalent in Mithila, a different rule prevails. We have considered the several authorities cited in the course of the argument, and are clearly of opinion that the step-mother can not succeed.

It was admitted that the decisions 1 Select cases S. D. A. pages 37 and 39, are the only express authorities in her favor. In those cases the right of the step-mother was upheld, but doubts are thrown upon them by Mr. Macpherson in his notes. The question depends upon the sense in which the word *"mátá"* in used in the *Mitákshará* in the Chapter on Inheritance.

It was urged that when a distribution is made after the life of the father, a step-mother is included under the word " mother."

In the *Mitákshará* the rule is laid down at page 285, para. 2, where it is said, "of heirs separating after the decease of the father, the mother shall take a share equal to that of a son;" and our attention was called to the fact that, in the *Mitákshará*, there is nothing to show that the step-mother is not included, whereas in the *Daya-bhaga* page 63, paragraph 30, the step-mother is expressly excluded.

We think that the rule, whatever it may be in the case of partition, is not necessarily applicable to the case of inheritance; and that although the word "*mátá*" may, in some cases, include a step-mother, it does not necessarily do so in all cases. The passage cited from Macnaghten's Hindú law 50 related to partition. We must look to the circumstances of each particular case in which the word is used.

It would be contrary to the reason for which according to the *Mitákshará*, a mother succeeds to her natural son in preference to his father, to hold that the mother includes a step-mother.

In Section 3, Chapter 2, page 343 of the *Mitákshará* it is said, "on failure of those heirs (speaking of daughters and daughter's sons) the two parents meaning the mother and father, are successors to the property.—Para. 1.

Paragraph 2 assigns a reason why, in construing the above text, the mother takes the estate in the first instance, and, on failure of her, the father.

Paragraph 3 proceeds:—"Besides the father is a common parent to other sons, but the mother is not so; and since her propinquity is consequently the greatest, it is fit that she should take the estate in the first instance conformably to the text, as to the nearest *sapinda* the inheritance next belongs."

In the note to paragraph 3 it is said—"The mother is in respect of sons not a common parent to several sets of them, and her propinquity is therefore more immediate, compared with the father's. But his paternity is common, since he may have sons by women of equal rank with himself, as well as children by wives of *Kshatriya* and other inferior tribes, and his nearness therefore is more mediate in comparison with the mothers. The mother, consequently, is nearest to her child, and she succeeds to the estate in the first instance. Since it is ordained by a passage of MANU that the person who is the nearest of kin shall have the property."

The reason given in the above cited passage shows that a step-mother is not intended to be included in the word "mother." Strange in his book on Hindú law, page 144, refers to the paragraph as an authority in support of the text—"step-mothers, when they exist, are excluded." See also Macnaghten's note 1 Select Cases page 39, note (a) id. 42, note (a). There are other passages in the

Mitákshará with regard to the rights of the grandmother to succeed to the property of grandson's son in preference to grandfather, which show that step-grandmothers could not be included. See Chapter 2, Section 4, para. 2, id., Section 5, para. 2, and the notes on those passages.

For the above reasons we are of opinion that a step-mother cannot take by inheritance from her step-son. We may remark that our opinion is in conformity with the table of succession prevalent in the Western Schools, including Mithila, prepared by Baboo Prosunno Coomar Tagore according to the *Mitákshará, Vivåda-chintá-mani* and other works, in which it will be found that step-mother and step-grandmother are entered as *nil*. The table immediately succeeds the preface to *Vivåda-chintá-mani* by Prosunno Coomar Tagore.—Sutherland's Full Bench Reports, for 1862—1864, page 173.

According to Hindú Law obtaining in Western India, the wives of *Gotraja Sapindas* and *Samánodakas* have rights of inheritance co-extensive with those of their husbands immediately after whom they succeed.—*Lakshmi* widow of *Kalyan-rav Anant*, Appellant—*Jayram Hari Ravji Sripat* and *Ganpat Rav Mahipat*, Respondents.—Bom. H. C. R. a. c. j. Vol. VI, p. 152.

CALCUTTA H. C. A.—*The 19th of June* 1876.

Before Mr. Justice Pontifex.

JOHURRA BIBEE *versus* SREE-GOPAL MISSER and others.

A joint family property acquired and maintained by the profits of trade is subject to all the liabilities of that trade.

Ramlal Thakursidas v. *Lakmichand* (1) followed.

Pontifex, J.—The plaintiff in this case is the widow of Monohur Lall, who died in the lifetime of his father Lutchmee-narain Kuppoor Khettry. Lutchmee-narain left a brother joint in estate, Hurry-narain Kuppoor Khettry, who subsequently became insolvent. The parties were and are governed by the *Mitákshará* law.

(1) Bom. H. C. App. 51, at p. 71.

The plaintiff claims that, as the widow of Monohur Lall, she has a right to be maintained and supplied with money for the performance of her religious ceremonies out of the rents and profits of the house, No. 13 Roop-chand Roy's Street, in Calcutta, as property which belonged to the joint family, and that any interest which passed to the Official Assignee as representing Hurry-narain the surviving member of the joint family passed subject to such rights. A great many cases have been cited in support of the proposition, that a widow has what is called a lien for maintenance on the joint estate and particularly in a Mitakshara family. It is not necessary for me to give any opinion on the ordinary case, where the surviving members of a joint family contract to convey without reserving the widow's rights, for in my opinion the present is a special case which does not fall within the ordinary rule. The plaintiff, in her plaint, admits that the property out of which she claims maintenance, was acquired by her father-in-law partly by money supplied to him by his father, and partly out of the profits of a business for the sale of shawls, silks, and Benares piecegoods which he carried on with moneys, portions of which were given to him by his father, and portions received by him from his estate. In my opinion, the business established and carried on with moneys so derived must be treated as a joint family business, and in fact the insolvent was carrying on such business at the date of his insolvency as appears by the written statement of the Official Assignee.

It was in respect of his debts incurred in such business that Hurry-narain was adjudicated insolvent. And it is not alleged that any of the debts were incurred improperly, or otherwise than in the due course of business. The debts of the family business became greater than could be provided for by the insolvent or the joint family property, and the insolvent accordingly filed his petition. It seems to me that the law is correctly laid down in the case of *Ramlal Thakursi-das* v. *Lakmi-chand* (1), that persons carrying on a family business in the profits of which all the members of the family would participate must have authority to pledge the joint family property and credit for the ordinary purposes of the business. And therefore that debts honestly incurred in carrying on such busi-

(1) Bom. H. C. App. 51, at p. 71.

ness must override the rights of all members of the joint family in property acquired with funds derived from the joint business. In other words, it seems to me that those who claim to participate in the benefits must also be subject to the liabilities of the joint business, and by the plaintiff's own admission, the joint family title to the house, in respect of which she claims, would not have existed, except for the profits of the business. I had some difficulty at first in seeing how the house could vest in the Official Assignee without being subject to the claim of the plaintiff; but the debts being joint business debts and as such, debts for which business creditors could have attached the property, the whole interest in the property vested in my opinion in the Official Assignee. In this case, the property was put up for sale by the Official Assignee, subject to the plaintiff's right (if any) to maintenance, and was so conveyed. The effect of such conveyance is, that the purchaser took only such estate as the Official Assignee could give, but if the plaintiff had no right the purchaser would take an absolute estate. In my opinion, the plaintiff, under the circumstances of this case, has no right as against joint creditors to maintenance or residence, out of or in the house in question. I am however of opinion that the plaintiff has no claim which can be enforced against any part of the joint estate, until after payment of the joint trade debts. *Suit dismissed.*—

Indian Law Reports, Calcutta Series, Vol. I. pp. 470-476.

The lien of a Hindú widow for maintenance out of the estate of her deceased husband is not a charge on that estate in the hands of a *boná fide* purchaser irrespective of notice of such lien.

A Hindú widow, before she can enforce her charge for maintenance against property of her deceased husband in the hands of a purchaser from his heir, must show that there is no property of the deceased in the hands of the heir.

Debts contracted by a Hindú take precedence of his widow's claim for maintenance, and *semble*, that if a portion of his property is sold after his death to pay such debts, the widow cannot enforce her charge for maintenance against such property in the hands of the purchaser.

Quœre.—Whether a Hindú widow, by obtaining against her husband's heir a personal decree for maintenance unaccompanied

by any declaration of a charge on the estate, does not lose her charge upon the estate.—*Adhiranee Narain Coomary* (one of the defendants) versus *Shona Malee Pat Mahadai* (plaintiff) and *Biddyadhur* (Defendant).—Indian Law Reports, Calcutta Series, Vol. 1, p. 365.

PRIVY COUNCIL—*The 2nd and 3rd of July* 1875.

BAIJUN DOOBEY and others (Defendants),
versus
BRIJ BHOOKUN LALL AWUSTI (Plaintiff).

[*On appeal from the High Court of Judicature at Fort William in Bengal.*]

C, a Hindú, inherited from his father property charged, under the Mitakshara law, with the maintenance of N, his mother. C dying without issue, his property passed to D, his widow, who allowed the maintenance of N to fall into arrears. N brought a suit against D personally for the amount of the arrears, and obtained a money decree, in execution of which D's right, title, and interest in the property left by her husband were sold. Neither the decree nor the sale proceedings declared the property itself to be liable for the debt. In a suit by the reversionary heir of C, after the death of D, to establish his right of inheritance to, and to recover possession of, C's estate, *Held*, that the purchaser at the execution-sale took only the widow's interest, and not the absolute estate, and therefore the plaintiff was entitled to recover.—Indian Law Reports, Calcutta Series, Vol. I, p. 133.

ALLAHABAD H. C. A.—*The 29th of June* 1876.

GAURI (Plaintiff) *v.* CHANDRAMANI (Defendant).

A Hindú widow, who resides with her husband and the members of his family in the family dwelling-house while he is alive, is entitled to reside therein after his death, and cannot be ousted by the auction purchaser of the rights and interests in the house of her husband's nephew.

Mangala Debi *v.* Dinanath Bose* followed†.

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* 4 B. L. R., O. J. 72; s. c., 12 W. R., O. J. 35. Ante pp. 605, 606.

† See, however, *Mohun Geer* v. *Tota.* H. C. R., N. W. P., 1872, p. 153.

The plaintiff in this suit was the auction-purchaser of the rights and interests in a certain dwelling-house of his judgment-debtor, Bindesri Pershad.

Bindesri Pershad was the son of Lachman Pershad, deceased, and nephew of Beni Pershad, also deceased.

When the plaintiff endeavoured to obtain possession of the house he was resisted by the defendant, the childless widow of Beni Pershad who was residing in the house, and claimed the right to reside in a moiety thereof as her husband's widow. He therefore brought the present suit to eject her.

The Court of first instance gave him a decree. The lower appellate Court held, on the ground that a moiety of the house was admittedly the separate property of Beni Pershad, that the defendant was entitled to the right of residence claimed by her, and dismissed the plaintiff's suit.

The plaintiff appealed to the High Court.

The judgment of the Court was as follows:—

It does not appear to have been admitted that the property was held by Lachman Pershad and Beni Pershad in equal shares, but assuming it was the joint property of the two brothers, the widow of Beni Pershad is entitled to live in it, it being the house in which she resided with her husband. She cannot be ousted by a purchaser of her nephew's rights.—*Mangala Debi* v. *Dinanath Bose*.* The house is a small one, and it is not shown that one moiety is more than sufficient as a residence for the Mussammat. We shall not, therefore, disturb the decree of the lower appellate Court, but dismiss the appeal with costs.—Indian Law Reports, Allahabad Series, Vol. I, p. 262.

ALLAHABAD.—*The 8th of May* 1876.

Held by the Full Bench that a Hindú widow is not entitled, under the Mitakshara, to be maintained by her husband's relatives merely because of the relationship between them and her husband. Her right depends upon the existence in their hands of ancestral property.

* 4 B. L. R., O. J. 72;—12 W. R., O. J. 35. *Ante*, pp. 605, 606

Held, on the case being returned to the Division Bench, that the fact that the defendant in this case was in possession of ancestral immoveable property at the death of his son and had subsequently sold such property to pay his own debts, did not give the son's widow any claim to be maintained by him.—*Gunga Bai* (Plaintiff) versus *Setaram* (Defendant.)

Indian Law Reports, Allahabad Series, Vol. I, F. B. p. 170.

THE END.

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illegitimate—See illegitimate son.

SON'S SON—(See grandson)

SON'S WIDOW—

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takes the share of his deceased parcener to the exclusion of his widow and the rest ... 35, 36, 41—43, 149, 473—475, 481—485
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the word—is employed with a general import to embrace all the females entitled to inherit 417, 427, 433, 435
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is entitled also to that property which her husband died entitled to, or had a vested right in, or which was separately acquired by him ... ... 240, 244, 245—251, 443
is no heir to her husband's brother or his widow, after his or her death 242, 243
if unchaste, is not entitled to inheritance ... ... 251—258, 402, 403
if suspected of incontinence upon a good ground, is not entitled to inheritance, but to maintenance only ... 251—258
once vested with the right of inheritance is not liable to be divested of it unless her subsequent incontinence were accompanied by degradation, that civil death ... ... 25[illegible]
is not bound to live in the family-house and with the kindred of her husband, who have no right to compel her to live with them; and the—— does not forfeit her right to property or maintenance merely on account of her going and residing with her family, or leaving her husband's house from any other cause than unchaste or improper purposes ... ... 258, 58[illegible]

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though a—fully represents the estate, and takes as heir, she takes a special or qualified estate, that is a restricted estate of inheritance: she cannot of her own will, that is without the consent of her husband's heirs, alienate the movable and immovable property of her husband except for special purposes ... 240, 260—268, 278, 288, 404, 407, 408, 410, 411, 489
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THE END.